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CURRENT LEGAL PROBLEMS 1958

VOLUME 11

AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

INDIA
N. M. Tripathi Private Ltd.
Bombay

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

CURRENT LEGAL PROBLEMS

1958

EDITED BY

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AND

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On behalf of
THE FACULTY OF LAWS, UNIVERSITY COLLEGE,
LONDON

VOLUME 11

LONDON
STEVENS & SONS LIMITED
1958

BIBL.
LONDIN.
UNIV.

First published in 1958
by Stevens & Sons Limited
of 119 & 120 Chancery Lane
London — Law Publishers
and printed in Great Britain
by Bradford & Dickens
of London W.C. 1

All editorial communications should be addressed to:
The Editors,
'CURRENT LEGAL PROBLEMS,'
Faculty of Laws,
University College, London,
Gower Street, London, W.C. 1.

BIBL.
LONDIN.
UNIV.

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PREFACE

THIS is the eleventh volume of *Current Legal Problems* containing, together with Sir Edwin Herbert's Presidential Address to the Bentham Club, the public lectures which were delivered under the auspices of the Faculty of Laws of University College, London, during the Session 1957–58.

This volume also includes a Special University Lecture given at the College by Mr. W. O. Hart under the same auspices. We wish to express our thanks to the University of London for so willingly granting permission to publish this lecture in this Annual.

We should also like to thank all concerned, contributors, publishers, and printers, for their assistance in achieving the speedy publication of this volume, and our colleague, Mr. D. W. M. Waters, the Assistant Editor, for his work on the proofs and for compiling the Index and Tables of Cases, Statutes and Treaties.

THE EDITORS

University College, London
April, 1958

I

EDUCATION FOR THE LEGAL PROFESSION

Sir Edwin Herbert

I must first express to the members of the Bentham Club my gratitude for the honour you have done me in electing me your President this year. I little thought, on that memorable day, when to my great surprise I found that I had been successful in the final examination for the LL.B. degree, that I should one day be called upon to address so distinguished a body of graduates.

During the intervening period I have been in practice as a solicitor in the City of London for some thirty-eight years, and have been a member of the Council of the Law Society for twenty-two years. All this has brought me into direct contact with many of the problems concerning education for the legal profession and I believe that the subject is ripe for consideration as a whole at the present time. It is for that reason that I have ventured to choose this subject for my presidential address to you. It will be understood that anything I say is my personal responsibility, and not that of any other person or body.

You may have observed that I use the phrase, 'Education for the Legal Profession,' in preference to the more usual term 'Legal Education.' I have done this designedly, and for three main reasons.

The first reason is that in my view, to confine one's consideration to that part of the required education which consists in actual legal studies—what might be called technical or vocational training—is to take too narrow a view of the matter. To provide adequate training in the study of the law is of undoubted importance. Of even greater importance is the type and cast of mind which is going to apply itself to that study. That type and cast of mind will be determined partly by heredity, partly by family circumstances, and partly by the environment in which pre-technical education has been given, as well as the actual content of that education. It is part of my thesis not only that the technical and vocational training should be designed to make the best use of the human material subjected to it, but that it is equally important to attract the right type of mind, and perhaps almost more importantly, the right type of character.

The second reason is that I believe it to be necessary that one should consider the legal profession as a whole, including in it, solicitors, barristers, and those occupied in the academic world for the purposes of teaching and research. If I concentrate largely on the position of solicitors and barristers it is not because I under-rate the value of the work of academic lawyers, on the contrary I regard it as of the utmost importance, and I hope that it will always continue to attract the acutest minds and the most devoted characters. I have lived all my working life in the hurly-burly of practical affairs. If I were asked to say how I have spent my life the truest answer I could give would be, in doing something during the next hour which could not with decency or reason be postponed. I am most thankful that I underwent the academic training required for a degree, in addition to the more technical training required to become a solicitor. I have never lost a sense of regret that life has led me out of the shade of academic groves into the heat and dust of practice. But I believe that I have never lost the sense of law as a science, an intellectual influence shaping one's way of life. I am still grateful to academic lawyers such as the late Dr. Jenks for implanting this sense in me, an influence which while intangible and imponderable has been pervasive. This academic background is of the greatest value, and as many law students as possible should have the advantage of enjoying it during their early and most formative years.

My third reason is a composite one, and contains within it two elements which, at first sight, might appear to be mutually contradictory. The first element is the belief that the division of the legal profession into its two branches, the Bar and the solicitors branch is a good thing in the public interest and should, at all costs, be preserved. The second element is the belief that if this division is to be preserved it will be necessary for the two branches to come much closer together in planning their method of entry, and perhaps also their method of exit, and in consequence collaborate more closely in planning their respective systems for the study of the law.

This is not the time or place to enter upon a justification of the division of the profession with its elaborate code of etiquette as between barristers and solicitors, designed to maintain in the completest degree possible the independence of the Bar. My conclusions are drawn not only from over forty years of practical experience in this country, but also from some practical experience of the Dominions, the United States of America, and other foreign countries. In some of these there is what is sometimes here termed, fusion of the two branches of the profession. The same person with one qualification may do solicitors' work, or barristers' work, or both. In some places many of the judges are elected by popular vote and return to practice when their terms of office on the Bench have expired. In other places the Bench is a separate profession with a separate training, and judges are not drawn, whether by appointment or by popular election, from amongst the general body of practitioners.

I shall content myself here with stating three conclusions, which in my belief are well founded. These are, first: that, at any rate in the superior courts, cases are better presented both in the interests of the clients and the interests of developing the science of law, if the function of presenting the case in court is separated from the function of getting the case up in its early stages.

Second: I believe that the employment of both solicitors and barristers in the preparation and presentation of a case does not involve the client in more expense than he would incur if the same person, or group of persons, were to perform both functions.

Third: I believe that the system of appointing judges from amongst practising barristers whose independence has been preserved, as our present system does preserve it, is the best guarantee of the independence of the Bench. I believe also that the continued association of the judges and the Bar in the camaraderie of the Inns of Court is a pervasive influence in the same direction, an influence which it would be easy to underestimate. I do not believe that this camaraderie could continue unimpaired if solicitors, with their direct contact with the lay client, were admitted into it, however acceptable the solicitors on personal grounds might be.

On the other hand I believe that it is going to be increasingly difficult to maintain this desirable division unless both the Bar and the Law Society recognise that conditions have greatly changed since the present system of education for and call to the Bar, and education for, and admission as a solicitor came into being.

I submit that it is impossible, or at least unfruitful, to consider what form education should take unless one asks the question, 'For what is one educating?' I submit further that the education for, and method of entry into the solicitors' profession may be well adapted to what solicitors' work was two or three generations ago, and that education for and entry to the Bar may be well adapted to the work barristers might have expected to do two or three generations ago. I also submit, however, that neither is particularly well adapted in all respects to the type of work a barrister or solicitor may be expected to do today.

These systems of training and entry date back to a time when the work of a solicitor and the work of a barrister were much more clearly differentiated than they are today. The solicitor was regarded as the practical man of business who conducted the practical affairs of his clients in ordinary commercial matters, in conveyancing, in probate, in the making of wills, and in the getting up of cases for litigation. He also acted as an advocate in the magistrates' courts and in the county court, the latter being a fairly recent institution. He was not expected normally to be a very good academic lawyer, and the academic part of his training was, and still is, to a large extent subordinated to the gaining of practical experience. In anything requiring much knowledge of the law, and certainly any specialised activity, he normally expected to go to counsel. Indeed the schedule of solicitors' fees for contentious business, long out of date as it is, is constructed on the basis that the solicitor's part of the work is of almost a menial order, the real thought and learning coming from the side of the Bar.

The work of the Bar was fairly clearly defined. The barrister either sat in chambers writing opinions or holding conferences, or appeared in court. He would under no circumstances expect to find himself working in a nationalised industry, or in some government department, or in some commercial firm, or a town hall, doing work indistinguishable from that of a solicitor working in the same office, on the same task, and possibly in the same room.

The scope of work for solicitors has widened enormously even in my own legal lifetime, and is incomparably greater than it was two or three generations ago. A good solicitor today must, I believe, be a good lawyer, even if his main function is to apply his learning and experience to the day to day practical affairs of his lay clients. I would say that most good solicitors today carry matters through on their own responsibility, which two or three generations ago would, as a matter of course, at one stage or another, have involved the obtaining of counsel's opinion. Moreover, new branches of practice have sprung up in many of which solicitors have become as expert as counsel. There are many solicitors whose opinion on a taxation matter, for example, would be considered as valuable as that of most counsel. A competent tax solicitor would not expect to go to counsel unless he had some real doubt about the matter, or unless the magnitude of the matter was such that he felt that both he and his client should have the protection of counsel's opinion.

To take another example; there are many solicitors who as a matter of course today carry through company transactions which not so long ago would have required the assistance of counsel, almost as a matter of course. One can give many other examples, all of which would be illustrations of the extent to which the normal work of a solicitor overlaps with the normal work of a barrister conducted in chambers.

I believe, however, that it is in the field of advocacy itself that the overlap has become most marked. Barristers have an exclusive right of audience only in the House of Lords, the Judicial Committee of the Privy Council, and the Supreme Court of Judicature, including the Court of Appeal, Queen's Bench Division, Chancery Division, and the Probate Divorce and Admiralty Division. To this list must be added some Quarter Sessions, the new Restrictive Practices Court, and in effect appearances before committees of both Houses of Parliament in the promotion and opposition of private Bills. The work of most of these courts and tribunals is shrinking. Large sections of the work, for example, that used to be done by parliamentary committees is now done by other tribunals and commissions. Matters of great weight and moment and of an importance equal at least to the average case conducted in the High Court are conducted before tribunals and other bodies where solicitors and barristers have equal rights of audience, and where solicitors often find that they can hold their own as advocates against members of the Bar.

I would remind you of such things as planning inquiries, arbitration, inquiries into railway rates, bodies such as the Monopolies Commission, proceedings under the Road Traffic Acts, all of which may and do involve heavy matters of litigation, and which are conducted frequently by solicitors appearing as advocates. There was a time in my professional life when I was doing as much advocacy as most members of the Bar, and in the course of which I have crossed swords with many of its outstanding leaders, and my own experience is by no means unique. In many of these cases solicitors have a positive advantage over barristers in that so much depends upon a knowledge of the practice and the procedure, rather than on a profound knowledge of legal principle.

This spread of solicitors' work and the consequent overlapping with the work of the Bar has had, I think, an adverse effect on the position of the young barrister. The effect is mitigated, but only partially mitigated by the coming into force of the Legal Aid Scheme. So much of the work which used to go from solicitors' offices to counsel could be done by any reasonably competent young barrister. Today, apart from legal aid cases, there is a tendency to seek counsel's opinion on points only upon which the solicitor himself feels doubt. The solicitor, therefore, tends to seek the opinion normally of the eminent or the experienced specialist. In actual litigation the same phenomenon appears. The cases which still go to the courts in which the Bar has an exclusive right of audience tend to be cases in which there is a difficult point of law, or where the amount at stake is large. In both types of case the solicitor will naturally wish to brief not a competent young junior but a barrister whose experience and reputation justifies his being briefed.

The gap between the successful leader and the struggling junior tends all the time to become greater, with the consequence that the early years at the Bar, which were always difficult, have become more difficult still. The result is that young men, other than those with well-to-do relations (a rapidly diminishing race), tend to fight shy of the Bar, and many who do become barristers give up the struggle and take up employment in the legal departments to which I have already referred, where they work side by side with solicitors on the same tasks, thus giving rise to the difficult problem of 'barristers doing solicitors' work,' which has caused a good deal of friction between the Bar and the solicitors' branch of the profession.

In pessimistic moments one is inclined to ask, where is the supply of competent barristers and, therefore, of able and independent judges coming from, particularly when one bears in mind the attractions offered to able young men in industry and commerce? Also one is forced to ask the question whether, in face of this competition, the solicitors' branch will continue to attract recruits, adequate in both quantity and quality?

With all these considerations in mind may we now consider the present system of education first for solicitors and then for barristers?

An intending solicitor must first of all have had an education up to the equivalent of university entrance standard. This qualifying examination may take the form of the preliminary examination conducted by the Law Society but more usually it takes the form of one of the exempting examinations which the Law Society accept. Having obtained this qualification the intending solicitor must next satisfy the Law Society after an interview with a panel of practising solicitors, that he is of fit character to become a solicitor. He must then find a solicitor in practice who is willing to take him as an articled clerk. If he can find such a solicitor the solicitor may, or may not, charge a premium for his services as a principal.

It is not now difficult to find solicitors who are prepared to take likely young people as articled clerks without the payment of a premium; but as a rule the articled clerk must reconcile himself, or perhaps I should say his parents must reconcile themselves, to the fact that during his period of articles the articled clerk will not usually receive any pay or subsistence allowance from his principal. The normal term of articles is five years but this is reduced to three years if a university degree is obtained. If the degree is a law degree that carries the additional advantage of exemption from the Law Society's intermediate examination in law, although the part devoted to trust accounts and bookkeeping still has to be taken.

During the term of articles, except in cases where there has been an exempting law degree, the articled clerk has to take two examinations, the first is the intermediate examination and the second the final. The intermediate examination is taken early in the period of articles, and is normally preceded by a compulsory year's attendance at law school, whether at the Law Society's school in London, or an approved school in the provinces. May I say in passing that the attempt to attach to the faculties of laws at the provincial universities a course which will satisfy the requirements for compulsory attendance at law school, and also prepare for the solicitors' intermediate examination, is an entirely unsatisfactory compromise both from the point of view of the student and from the point of view of the university. The solicitors' final examination is perhaps the most severe of all the professional qualifying examinations. It has a markedly practical bias, the papers being set and marked under the supervision of the Law Society, by examiners who for the most part are practising solicitors. There is an honours examination where the papers are set and marked by academic lawyers, with co-ordination through a practising solicitor, and which is at least the equivalent of a good law degree. The papers of honours candidates, however, are not read unless the candidate has obtained a sufficient standard in the final examination, so, although the honours examination is much more academic in tinge than the final examination, the same element of practicality persists throughout. Once the candidate has passed the final examination and has proved satisfactory service under articles, then subject to final proof of good character, he is entitled to be admitted. From then on he may practise as a solicitor in any form he likes, indeed, one may say, without being facetious, that he is let loose on the public with the certificate of the Law Society that he is sufficiently educated and trained to conduct the affairs of any lay client who is prepared to trust him. But, of course, from then onwards the solicitor comes under severe discipline. He has to obtain his practising certificate every year. With each application for a practising certificate he has to lodge an accountants' certificate showing that the Accounts Rules have been properly complied with. He has to make a compulsory contribution each year to the Law Society's Compensation Fund, and so long as he continues in practice he is indeed under one of the severest forms of professional discipline that exists.

It is, I think, generally accepted that having regard to the nature of solicitors' work, a strong element of practical experience must enter into a solicitor's training. It is equally true that he must be given a firm grounding in the principles of the law. It is certainly desirable that he should be kept in touch as far as possible with the academic world. It is impossible, I believe, adequately to satisfy all these three requirements during the course of a period of five years' training, or six years in the case of an articled clerk who has obtained a university degree before entering into articles. In consequence the Law Society is faced with all kinds of problems. For example—what is the best way, and what is the best time at which compulsory attendance at

Law School should take place? If a man wishes during articles to study for a university degree, in addition to studying for the solicitors' qualifying examinations, how long absence from the office should be permitted to count as good service under articles? How long can an articled clerk be permitted to be absent from the office for the purpose of attendance either at Law School or with a law coach for instruction leading to the final examination? These and many other questions have never been really satisfactorily answered. Constantly we find ourselves trying to get a quart into a pint pot. This tendency becomes even more marked as the desire to train our entrants better, itself becomes more marked. Indeed, one of the reasons which prompted me to take this subject for my address, is the belief that it has now become impossible to satisfy all these desiderata within the ambit of the present system. I feel also that the system of taking premiums and the system of refraining from paying articled clerks during their term of service under articles is more and more making it impossible, or at least very difficult, for the solicitors' branch of the profession to compete with the attractions held out to young men and women and their parents, at the stage of leaving the university. This aspect of the matter, of course, has been accentuated as a result of National Service. Even assuming National Service to be in process of abolition, though I doubt whether this is altogether a safe assumption, it is very difficult indeed for a young man or woman to become qualified to practise, and to spend the appropriate amount of time at the university, before attaining the age of twenty-four to twenty-five. With National Service the age has been twenty-seven to twenty-eight. Even to mention such ages or such periods of work without pay clearly postulates the existence of a class of parents who can afford the financial burden for that length of time. There are few, and there will presumably in future be still fewer, who can shoulder that burden. In consequence more and more people who could, and should, enter the solicitors' branch of the legal profession are drawn off into other activities of life not because they would not make good solicitors, not because the long term prospects of industry are necessarily more attractive, but because the first few years are becoming an insuperable obstacle both to them and to their parents.

When one turns to the Bar one finds the position is at least as serious. It is true that to get called to the Bar is a simpler, shorter and less expensive process than the process of becoming admitted as a solicitor, but if one is intending to practise at the Bar then the opposite may well be the case. In order to be called to the Bar it is necessary only to join one of the Inns of Court as a student, to keep Commons, which involves eating a certain number of dinners a term in hall, to satisfy the Benchers of the Inn as to character and to pass the Bar final. The standard of the Bar final has, I believe, been raised considerably in recent years but it is still a much less exacting examination than that of the solicitors and much less practical in its outlook. It is possible for a university student to keep his Commons while he is still at the university and the Bar final should present few terrors to a student who has obtained a respectable degree in Law at the university. For one who intends to practise as a barrister the qualification for call to the Bar is probably adequate for two reasons.

The first is that he is not let loose on the lay client but must look to solicitors with established practices for employment. The second is that in substance call to the Bar is only a preliminary to at least one year's pupillage in a barrister's chambers, after which the young barrister must find his way in these or other chambers, probably with little more than some devilling to help him through the early years. In reality, therefore, by the time a barrister is likely to receive any serious work from a solicitor he has had both a theoretical training in the law and practical experience in the chambers of a practising barrister.

The young man or woman, however, is unlikely to make a living in the first four to five years at the Bar and if at the end of that time he has not established the prospect of a reasonable practice of his own it is unlikely that he ever will. It is difficult, therefore, to see how any one without either private means or parents able and willing to support him, can well take the risk of attempting to become a practising barrister. Naturally, as a solicitor, I am not very familiar with the financial arrangements within the barrister's chambers. I am aware that partnerships are not permitted, or likely to be permitted, and it may well be undesirable that they should be permitted. I strongly suspect, however, that a good deal more could be done by the senior members in a set of chambers to make the financial lot of the pupils and young juniors more tolerable.

In consequence more and more people are getting called to the Bar, not with the object of practising as barristers, but with the object of obtaining a relatively cheap and speedy legal qualification which will enable them to obtain employment in the legal departments in the civil service, or the local government service, or elsewhere, on terms of equality with solicitors who have undergone a longer, more expensive, and more practical training, with a much more severe qualifying examination at the end of it. May I say, quite categorically, that to my mind this employed work is really solicitors' work, and that the bare minimum of training and experience necessary to be called to the Bar is an inadequate preparation for it. Consider, for example, the position of a civil servant or local government officer without any legal qualification. It is perfectly possible for him to obtain the qualification of a barrister at the cost of two or three years' evening work without interfering with his employment and without being subjected to anything like the same degree of training and experience as that undergone either by a solicitor, or by a barrister who has genuinely attempted practice for some years without the good fortune coming his way, which is an indispensable element in success.

On the other hand I feel equally strongly that barristers who through no fault of their own cannot stay the course as practising barristers should be encouraged, subject to proper safeguards in the matter of qualifications, to go on utilising their legal knowledge and experience within the legal profession as solicitors, whether in private practice on their own account, or as qualified managing clerks in private practice, or in salaried employment. Equally, I believe that it is wholly natural and right that a man who has started as a solicitor should be able to pass to the other branch of the profession and become a barrister, should he find in the light of experience that his particular gifts and inclination make him wish to specialise either in advocacy, or the type of chamber work done by barristers.

Up to this point I believe that much of what I have said will be considered uncontroversial. I have done little more than state what many barristers and solicitors and law students are thinking and saying.

I invite you now to consider possible ways by which some of the difficulties to which I have referred might be overcome. I believe, however, that if they are to be overcome a new approach to the education of both barristers and solicitors is needed. I am aware that at this point I may well be moving from the realm of the uncontroversial into the realm of the controversial. I make the move with due humility and with the intention of throwing out ideas in the hope that they may provoke thought, rather than with the intention of putting forward a cut and dried scheme complete in every particular.

May I start by setting out what appear to me to be the objectives one should wish to attain. Perhaps one might summarise these objectives as follows—

(1) The present division of barristers and solicitors, with its accompanying practice and etiquette, should be retained.

(2) It should be made as easy as possible for a barrister to become a solicitor, or for a solicitor to become a barrister.

(3) That the work of a lawyer in the legal departments of the civil service, the local government service or other salaried employment, should generally be carried out by persons qualified as solicitors.

(4) That the academic element in the training of both barristers and solicitors should be retained and if possible intensified.

(5) That every possible step should be taken to remove the financial handicaps which at present beset the budding barrister and the budding solicitor.

If I am right in this analysis it follows that while the Law Society could by changes affecting solicitors only, go some way towards alleviating the difficulties besetting budding solicitors, and the Inns of Courts with the co-operation of individual barristers, and particularly heads of chambers, could go some way towards alleviating the difficulties of budding barristers, it is not possible to attain all the objectives I have enumerated save through a scheme in which both the Bar and the Law Society would need to co-operate. I would, indeed, reiterate what I said earlier in this address, namely, that if the two branches of the profession are to retain their desirable separation and independence, closer co-operation is needed between the Bar and the Law Society in planning both the entrance to, and the exit from, both branches of the profession.

In pursuance of that train of thought I venture to put forward the following points for consideration.

In the first place is there any reason why the basic legal training should not be the same for both barristers and solicitors?

Each branch of the profession requires to be well grounded in the principles of the law, which presumably would cover such subjects as Real Property, Equity, Contract and Tort, Criminal Law and Procedure, and the Law of Personal Property. Is there any reason why an examination of this order should not be common to both branches of the profession? Moreover, if the standard of this examination which might be called possibly, 'Part (1) of the Law Final,' were made equivalent to an honours degree, might it not be possible to accept an approved degree taken in approved subjects as an exempting examination? I privately nurse the hope that if such a system were instituted the bulk of the students would, in fact, be encouraged to take the appropriate university degree and so obtain exemption from Part (1) of the Law Final. Such a system might have certain quite notable advantages. Law students would be trained together until the moment of differentiation arrives. They would be encouraged to take university degrees, whether external or internal, and whether at a residential or non-residential university. I have the feeling that contributions made by the Law Society out of their legal education funds, would be better employed in assisting law faculties generally towards the provision of tuition for the approved degree, rather than for the purpose of providing compulsory law school attendance leading to the present solicitors' intermediate examination.

If a law final Part (1) were so instituted the student would at some appropriate moment have to decide whether he wanted to be a barrister or a solicitor. If he wanted to become a solicitor he would then pass on to his practical training under articles and his final solicitors' examination Part (2). This might be limited to certain practical supplementary subjects such as Practical Conveyancing, Taxation, Trust Accounts and Book-keeping and possibly Company Law and Practice, all of which he should be able to prepare for without much loss of time in the office.

If the student wished to become a barrister he would then be provisionally called to the Bar on taking the Bar Part (2), which presumably would include such subjects as the Rules of Evidence, and any other subjects the Bar might care to specify. But I suggest that the barrister should not be entitled to practice or call himself a barrister-at-law until he had done, say, two years either in a barrister's chambers, or a solicitor's office, or partly in one and partly in the other. This period would be analogous to the period which a medical student has to spend in a hospital appointment after passing the qualifying examination but before becoming a registered medical practitioner.

From then on it might be accepted that a solicitor could become a barrister on passing the Bar Part (2) (in passing may I ask whether the existing period of quarantine really has any practical effect?) A barrister could become a solicitor by passing the solicitors' Part (2) of the Law Final. It must be recognised that inevitably the solicitors' Part (2) would be a more difficult examination than the barristers' Part (2), especially for a barrister who had had no practical experience in a solicitor's office. Indeed it might have to be accepted that a barrister could take employment in some legal department without first taking the solicitors' Part (2) on the understanding he qualified himself appropriately within a period of, say, two years.

For the full working of such a system it would no doubt be necessary to provide that although appointments to the Bench should still be made from amongst members of the Bar, any period spent as a solicitor in practice should be included in counting the qualifying years.

I am aware that this is only a sketch of a plan and that many important details would need to be filled in. Amongst other things it would involve the abolition of the solicitors' intermediate examination.

I submit, however, that if the reforms I have been suggesting were introduced, they would go a long way towards overcoming the difficulties to which I have referred.

The sequence of events leading to admission as a solicitor would be as follows—

If the student was not able to take a university degree he would be articled for five years during which period he would pay no premium and would receive, at any rate, subsistence, on perhaps a progressively rising scale year by year. At the end of the third year he would take Part (1) of the Law Final, having during these first three years, as much time off from the office as is necessary to attend compulsory law school and prepare for the examination. He would then have two years of experience in the office prior to taking the solicitors' Part (2) of the Law Final. I should expect him to need little, if any, time off from the office to prepare for this examination, bearing in mind its practical character and its relation to the practical experience he had been gaining in the office.

If, on the other hand, the student desired to obtain a university degree at a non-residential university he should aim at taking it at the end of his third year having such time off from the office as is necessary for this purpose. If he were going to a residential university he could either wait to be articled until he had obtained his degree, in which case he would be articled for three years, and would only have to take the solicitors' Part (2) of the Law Final, or he could be articled before he went to the university for six years, the time spent at the university counting as good service under articles. If he were articled before going to the university he could, no doubt, put in some time at the office during vacation which would be better experience, although perhaps less remunerative than working as a waiter in the long vacation, or sorting mails at Christmas.

The sequence of events for a barrister student would be somewhat similar. He could spend the first three years studying for a degree or for Part (1) of the Law Final. He would then put in two years either in a barrister's chambers, or in a solicitor's office, or partly in one and partly in the other. While he was in the solicitor's office he could be paid subsistence, and while he was in the barrister's chambers, I suggest with all due delicacy, that it should not be impossible for the senior members of the chambers to make life financially possible for him. From then on it should be relatively easy to move over from being a barrister to being a solicitor, or vice versa, and in that event the barrister would be properly qualified to do solicitors' work, and the solicitor properly qualified to do barristers' work, after the change had taken place.

I submit all these thoughts for the consideration of both branches of the profession and to those engaged in the academic world, in the belief that something of this kind is needed if each branch of the profession is to remain separate and independent, and if both branches of the profession are to attract and retain recruits of adequate calibre in character and intellect.

That such persons should be attracted is, we shall all agree, of vital importance not only to the legal profession but to the nation at large. The independence of the Bench, which in turn is dependent on the independence particularly of the Bar, but also of the solicitors' branch of the profession, is a vital element in our national life. We shall all agree that it needs fostering and maintaining.

Tradition, training and education can all play their parts but the best training in the world will not avail unless men and women of intellect, character and independence continue to join the ranks of both branches of the profession.

The inherent attractions of the legal profession, in either of its branches, as a vocation, and as a way of life, as well as a means of earning a living, are such that they must attract the right type of people even if the ultimate financial rewards do not equal those of success in industry or commerce. We do not wish to attract mere money-makers. They are not the stuff of which sturdy and independent lawyers are made. But let us not blind ourselves to the hard fact that if the early years in preparing for and practising the profession are made prohibitive in this time of rapid social change, even those with a strong sense of vocation towards the law may be driven elsewhere to the lasting loss of themselves, the Bench, the Bar, the solicitors' branch of the profession, and indeed to the nation itself.

It is with these weighty considerations in mind that I have ventured to address you upon this subject, and I thank you for the patience with which you have allowed me to have my say.

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ROMAN LAW IN COMMON LAW COURTS

RAPHAEL POWELL

IN many countries Roman law is acknowledged as an ancestor of the modern legal system. It is admitted that at some time or other it may have had its uses. But in varying degrees in different places its direct influence has receded farther back into the distance of history. Roman law has become more and more of a ghost. A teacher of Roman law who dares to avow his affection for the *Corpus Juris* in this twentieth century runs the risk of being accused of necrophily. 'Necrophily,' the dictionary tells us, means a morbid love of dead bodies.

APPLICATION OF FOREIGN LAW

Sometimes, however, even in the last hundred years, even in this twentieth century, and even in common law jurisdictions, the ghost walks and sometimes talks. Obviously that must happen when a court has to apply a foreign law founded on the civil law.

An example is the *Case of the Singapore Oil Stocks*[1]—the decision of a special tribunal in 1955. In Singapore, claims for compensation arising from the Crown's seizure of private property during the war of 1939–45 were decided by a War Damage Commission. Appeals from that Commission lay to a special Appeal Board. It was this Board which heard our case. The claimants had an exclusive concession to extract oil in the Netherlands East Indies, since 1949 called Indonesia. In February 1942 Japanese forces invaded and occupied this territory, mainly in order to obtain control of its oil resources. By December

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[1] *N.V. De Bataafsche Petroleum Maatschappli* v. *The War Damage Commission*, 22 *Malayan Law Journal*, p. 155 (1956). See also (1957) 51 *American Journal of International Law*, p. 862; 'B,' 'The Case of the Singapore Oil Stocks' (1956) 5 *International and Comparative Law Quarterly*, p. 85.

1942 they had got the refineries working and substantial stocks of refined oil products were shipped to Singapore. When British troops liberated Singapore these oil products were seized by the Crown and disposed of. The claimants claimed compensation against the Crown, alleging that they were the true owners. But how could concessionaires of the right to extract crude oil claim that they were owners of the refined products of oil? The Board heard evidence of Netherlands East Indies law and dismissed the claim, for two reasons. Firstly, though the matter was not wholly free from doubt, by that law oil still lying in the ground is *res nullius*—it belongs to nobody. A *res nullius* becomes the property of the first person who appropriates it, whether he is the concessionaire or not. The Romans used to call the appropriation of a *res nullius* '*occupatio*.' So by *occupatio* the Japanese acquired a title to the crude oil which they extracted. But secondly, even if it were true that the concessionaires owned the crude oil, the Japanese became owners of the refined products which they had manufactured from the crude oil. That was the result of another doctrine derived by the local law originally from Roman law. This is the doctrine of *specificatio*. The final solution reached in Roman law was that if a new species could be reduced to the material from which it was made it belonged to the owner of the material; but if it could not be so reduced it belonged to the maker of the new species. In our case it was agreed that, theoretically at any rate, you can change refined oil products back into crude oil. If the question had ever arisen in the courts of Justinian that argument might have been sufficient to give the ownership of the products to the owners of the crude oil. But this was the twentieth century. The Board said that as a matter of practical economics it would be impossible to turn the refined oil products back into crude oil and no one but a lunatic would ever think of attempting to do it. So for practical purposes the products had to be treated as irreducible. On the two grounds, therefore, both based on doctrines clearly traceable to Roman law, the Board held that the claimants had no claim and that the Japanese owned the oil products.

Our second case is *National Bank of Greece and Athens, S.A.*

v. *Metliss.*[2] In 1927 the National Mortgage Bank of Greece issued mortgage bonds. Payment of interest and principal on these bonds was guaranteed by another Greek bank, the National Bank of Greece. In 1941 the Germans occupied Greece and the National Mortgage Bank of Greece was unable to pay. In 1949 the Greek Government set up a moratorium suspending all rights of the bondholders. The proper law of the contract relating to the issue of the bonds, however, was English law. If, therefore, an English bondholder had sued for his interest in an English court he would have got judgment because English law would not have recognised the Greek moratorium. But the judgment could not have been enforced in Greece. And it would have been of little use in England because the National Mortgage Bank of Greece had no assets in England. Nor had the National Bank of Greece, the guarantor of the bonds. However, in 1953, this guarantor bank was amalgamated by Greek law with the Bank of Athens into a new banking company. The Bank of Athens had been carrying on business in England for many years and did have assets in England. Mr. Metliss was an English bondholder. He claimed interest on his bonds from the new banking company. The new company said that it was no party to the guarantee of the bonds and that it had not taken over the guarantee by any assignment or novation. But the Greek statute which authorised the amalgamation enacted that the new company should become the 'universal successor' to the rights and obligations of the amalgamated companies. This idea of universal succession comes from Roman law and is firmly entrenched in many modern legal systems. Its most common application is in the case of death, but it can apply to other cases. When a person dies, his successor steps into his economic shoes completely, taking over not only his assets but also his liabilities. In our case the new bank had succeeded to the liabilities of one of the merged banks, namely the guarantor bank—the National Bank of Greece. It had also acquired the assets of the other merged bank—the Bank of Athens. So the assets acquired from this limb were available to satisfy liabilities acquired from the other limb; both limbs were now part of one body. The House of Lords has recently affirmed the decision of the Court of Appeal that our courts should recognise a universal succession which exists under a foreign law, though Lord Simonds appeared somewhat reluctant to concede that the Roman notion of universal succession was anything more than an analogy.[3]

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[2] [1957] 3 W.L.R. 1056.

In the Court of Appeal, it had also been argued that if the assets of the old Bank of Athens were made available to satisfy the bondholders the English creditors of the old Bank of Athens would be prejudiced. Lord Justice, now Lord, Denning, conceded that this was a real difficulty. 'But,' he said, 'I think it can be surmounted by taking a leaf out of the book of Roman law.'[4] The Roman jurists had had to consider what would happen if a deceased person was solvent but his successor was insolvent. The Roman praetor had allowed the creditors of the deceased to apply to have the two states kept separate. Lord Denning thought that English courts also could devise some machinery to prevent injustice to any group of creditors.

The direct application of foreign law is a comparatively rare function of a common law court. Yet it is exercised sufficiently often to lend point to Sir Frederick Pollock's advice that 'Roman law is useful because a general understanding of it is the key to modern Continental systems and Continental lawyers' ways of thinking.'[5]

ROMAN ORIGINS OF THE COMMON LAW

However, the history of the law administered principally in common law courts shows abundant traces of Roman origins or influence. It would be wearisome to go over the paths which have been so well trodden by others—both legal historians and judges.[6] Suffice it to say here that the longer the paths have grown the less conscious we are of the places in which they had their beginning. That, perhaps, is the inevitable consequence of historical perspective. Yet from time to time in the last century the reports show that some lawyers have discerned the Roman origin of a common law rule, sometimes with the naked eye and at other times with the aid of a metaphorical telescope. In *Moore* v. *Moore*[7] Dr. Phillimore, arguing against a will, asserted with some heat that 'the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions.' But that was in 1817, and Dr. Phillimore was a civilian, and the court was the Ecclesiastical Court. More recently in *Re Knapton*[8] Lord Simonds, then Simonds, J., declared that 'it is the fact that a large part of our law in regard to testamentary dispositions is taken from the civil law.' A hundred years ago, in *Blakemore* v. *British & Exeter Rly. Co.,*[9] Coleridge, J., pointed out that the whole of the common law on the obligations of the parties to a bailment was 'mainly built' on the Roman law. More recently in *Re Ellenborough Park*[10] the Master of the Rolls quoted Holdsworth's account of the influence of the Roman law of servitudes upon the English law of easements. In more general terms Lord Halsbury at the beginning of this century conceded that 'there are parts of the Roman law which undoubtedly we have made part of our own law.'[11]

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[3] *ibid.*, at p. 1062.

[4] [1957] 2 Q.B. 33 at 44.

[5] F. Pollock, 'The Lawyer as a Citizen of the World' (1932) 48 L.Q.R., p. 37 at p. 39; F. H. Lawson, *A Common Lawyer Looks at the Civil Law* (1953), at pp. 210–11.

[6] See *e.g.*, W. S. Holdsworth, *Essays in Law and History* (1946), at pp. 76, 82–3, 188, and *History of English Law*, Vol. 12, at pp. 425–7, 639–702; Charles P. Sherman, 'Roman Law in the United States of America' (1935) *Atti del Congresso Internazionale di Diritto Romano, Bologna*, II,

In *David Copperfield,* Charles Dickens described the civil lawyers who were members of Doctors' Commons as 'a cosey, dosey, old fashioned, time forgotten, sleepy-headed little family party.' Holdsworth has cautioned us that 'it is well to remember that it was at these little family parties that the foundations of our modern Admiralty law were laid, that our modern prize law

at p. 325; Max Radin, 'Roman Law in the United States,' *ibid.,* at pp. 349–53; T. F. T. Plucknett, *Concise History of the Common Law* (4th ed. 1948), pp. 277–84.

[7] (1817) 1 Phill. Ecc. 406 at 433.

[8] [1941] Ch. 428 at 432.

[9] (1858) 8 E. & B. 1035 at 1050.

[10] [1956] 1 Ch. 131 at 163.

[11] *Keighley, Maxsted & Co.* v. *Durant* [1901] A.C. 240 at 244.

was created, that much international law was made, and that many of the principles of our modern probate and divorce law were worked out. And . . . let us not forget it was a talented little family.'[12]

THE QUALITY OF ROMAN LAW

Moreover the quality of the Roman law and those who were responsible for its development has been praised on more than one occasion in common law courts. Thus in *Dalton* v. *Angus,*[13] Lord Selborne said: 'No one who has ever looked at the Digest will complain of the Praetorian law as brief, nor will any one who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Praetors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they come.' And in the Australian case of *Nelson* v. *Walker*[14] Griffith, C.J., said: 'The Romans were practical people, and their laws were adapted to deal with things as they are when the law is to be applied, not as they were decades or centuries before.' It was that practical outlook and easy adaptability which in later centuries was to make Roman law available to meet the needs of the states of Europe. Another case worthy of mention is *Kennedy* v. *Broun,*[15] where the plaintiff appeared in person to argue at great length, and with considerable learning and industry, though ultimately without success, that a barrister was entitled to sue for his fees. Much of his argument was based on Roman law and history, but the court took a different view of the sources upon which he relied. In delivering the judgment of the court, Erle, C.J., paid equal tribute to English advocates and Roman jurists in a memorable passage[16]: 'In the growth of the English law, the advocates have been important agents in establishing the liberty of thought and speech and action which has resulted from the contests in courts where such liberty has been contended for. The English advocates in our historical trials are entitled to be gratefully remembered: and it must not be forgotten that their minds were trained in the practice of advocacy without any contract. So also the Roman jurists are entitled to be gratefully remembered, because their intuitive sense of right showed to them where right was in the conflicts of interest perpetually arising as the relations of man to man multiplied; and their words have helped to guide succeeding generations in their search for right when similar conflicts arose.' In *Acton* v. *Blundell*,[17] Tindal, C.J., described Roman law as 'the fruit of the researches of the most learned men, the collective wisdom of ages and the ground work of the municipal law of most of the countries of Europe.'

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[12] W. S. Holdsworth, *History of English Law,* Vol. 12, p. 50.
[13] (1881) 6 App.Cas. 740 at 819.
[14] (1911) 10 C.L.R. 560 at 567.
[15] (1863) 13 C.B.N.S. 677.
[16] *ibid.,* at p. 739.

THE EIGHTEENTH AND NINETEENTH CENTURIES

Certainly in the eighteenth century and throughout the nineteenth century the reports of a number of English cases contain many references to the Roman law sources and to the works of European civilians. The Roman texts are examined with considerable care and in great detail.[18] Sometimes the Roman rule is followed; but even where it is not followed, both judges and counsel often take great pains in giving reasons for distinguishing between the principles of the two systems or in showing why the Roman principle cannot be adapted to the circumstances before the English court. Thus in *Duffield* v. *Elwes*,[19] counsel for the respondents distinguished between the Roman law and English law rules relating to gifts in contemplation of death. In *Ryall* v. *Rowles*,[20] Burnet, J., contrasted Roman and English mortgages. In *Ashburner* v. *McGuire*[21] Lord Thurlow distinguished the civil law rules on ademption of legacies. Two years later, in *Scott* v. *Tyler*,[22] a case on conditional legacies in which much

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[17] (1843) 12 M. & W. 324 at 353.
[18] For examples see the cases cited in J. Mackintosh, *Roman Law in Modern Practice* (1934).
[19] (1827) 1 Bligh N.S. 497 at 522–3.
[20] (1749–50) 1 Ves.Sen. 328 at 358–9.
[21] (1786) 2 Bro. C.C. 108 at 110.
[22] (1788) 2 Bro. C.C. 431, Dick. 712.

Roman law was cited in argument, Lord Thurlow followed the Roman law rule in spite of the vigorous contention of counsel (Mr. Plumer) that the Roman rule counteracted two principles adopted by English law. In *Harwood* v. *Goodright*,[23] Lord Mansfield contrasted the civil law will and the English devise of lands.

Plucknett has stated[24] that all through the eighteenth century 'English lawyers were reading Continental works on natural law and jurisprudence, while English scholars were themselves producing comparative studies of their own and foreign systems.' The cases of not only the eighteenth century but also the nineteenth century show that this learning was being utilised by both counsel and judges in the courts and that they resorted not only to the later civilians but also to the Roman texts of the *Corpus Juris*. At the same time our lawyers were astute in their appreciation of the extent to which the Roman law had undergone—to use Lord Thurlow's phrase—'such ampliations and limitations as time and occasion have introduced.' And, if my judgment is correct, I think it is possible to see the influence of this scholarship upon their reasoning in the field of pure English law. Sir Carleton Allen has written these words of Lord Blackburn[25]: 'It may be said generally that in case after case this very learned lawyer, who, perhaps more than any other judge, exercised a notable creative influence on the development of the common law in the nineteenth century, showed himself a disciple of Roman principles.' Lord Blackburn had a prodigious ability to distinguish cases. Repeatedly we find that when counsel cites a case before him he interrupts counsel's argument with a sentence beginning 'In that case . . .' or 'That case does not bear much on the present' or 'The distinction between that case and the present is that . . .' Perhaps it will be said that Lord Blackburn and the counsel and judges who followed his pattern would have acquired this capacity for differentiation without any training in the civil law. But I have little doubt that their skill in comparison and distinction was sharpened upon the whetstone of the

[23] (1774) 1 Cowp. 87, Lofft 558.

[24] *op. cit.*, at p. 284.

[25] C. K. Allen, *Law in the Making* (5th ed. 1951), at p. 256.

civil law in both its ancient and its more modern manifestations. It would require greater skill and clarity of reasoning to persuade an English court to adopt a principle of foreign law, especially a principle which had originated more than a thousand years ago. In my submission that skill and clear reasoning were transferred to the arguments of lawyers on the application of purely English decisions, and with no small advantage to the common law, particularly because it is founded upon the following of precedents—a process in which the methods of comparison and distinction play a prominent part. Moreover, it was largely through their contact with the works of the continental civilians and their acquaintance with Roman law sources that the English judges of the seventeenth and eighteenth centuries were able to set a high standard of erudition and analytical capacity for both Bench and Bar to emulate in later years.

THE TWENTIETH CENTURY

Hitherto, with a few notable exceptions, the courts in the twentieth century have shown less inclination to follow the enlightened practice of the earlier centuries. The century began with a flourish of Roman trumpets. A plea for ratification of an unauthorised act by an undisclosed principal came before the Court of Appeal and later, unsuccessfully, before the House of Lords in *Keighley, Maxsted & Co.* v. *Durant.*[26] Lord Justice Collins in the former court, and Lord Davey and Lord Brampton in the latter, revealed a fair knowledge of the Roman texts, particularly on the subject of *negotiorum gestio.* And much of the old zeal for Roman law is still to be found in the judgments of Lord Dunedin on restitution in *Sinclair* v. *Brougham,*[27] of Lord Shaw of Dunfermline on frustration of contract in *Horlock* v. *Beal,*[28] of Sir Henry Duke, P., on salvage in *The Tubantia,*[29] and of McCardie, J., on the return of an engagement ring by a jilted woman in *Cohen* v. *Sellar.*[30]

[26] [1900] 1 Q.B. 629; [1901] A.C. 240.
[27] [1914] A.C. 398 at 431–5.
[28] [1916] 1 A.C. 486 at 513–14.
[29] [1924] P. 78 at 87.
[30] [1926] 1 K.B. 537 at 545–6.

But already in *Durant's* case there were signs of some impatience at the introduction into an English case of arguments founded on Roman law, particularly in the judgments of Lord Halsbury and Lord Lindley.[31] Plucknett alludes to the 'rare cases' in which 'even at the present day English courts upon occasion will refer to Roman law in something like Bracton's spirit.'[32] Sir Carleton Allen has written[33]: 'It is true that the voice of Justinian is heard once in our courts where the voice of our own legal authorities is heard a thousand times; and any counsel who based his argument solely on the Digest would occasion depression, if not a certain irritation, on the Bench.' But he adds later that 'it is quite artificial to condemn [Roman law] to the irrelevance of the "unauthoritative."'

THE AUTHORITY OF ROMAN LAW

The general rule, of course, is that Roman law is of no binding authority in English courts.[34] But Roman law has been quoted, even extensively, to show the origins of the English law[35] or, we occasionally suspect, to display the liberal character of the judge's education. In *Horlock* v. *Beal*[36] Lord Shaw of Dunfermline thought that it was at any rate not without interest to observe that the principle he proposed to apply had been laid down, and indeed its modern development had been foreshadowed, in Roman times. The same whimsical intellectual curiosity was shown by Lord Dunedin in *Sinclair* v. *Brougham*[37]: 'It is, I think, very instructive to see how it is dealt with in other systems. I therefore make no apology for going to the Roman law, not as an authority, for such it is not, but as instructive as to how these matters may be dealt with, and as suggestive . . . as to the true answer to the difficulties of the present case.' In the latter part of his judgment he issues this pointed challenge[38]: 'I have made these citations to show that other great systems of law have not been unable to solve the problem arising where the equity of restitution comes in contact with the doctrine of nullity of contract. Is English equity to retire defeated from the task which other systems of equity have conquered?' A somewhat similar attitude is found in *Spence* v. *The Union Marine Insurance Co., Ltd.*[39]—a case on the accidental mixing of goods. There Bovill, C.J., said: 'As the rules and principles of our mercantile and maritime law are in a large measure derived from foreign sources, we gladly avail ourselves of the codes and laws of other countries and especially of the Roman civil law, to see what amongst civilised nations has usually in like cases been considered reasonable and just.'

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[31] [1901] A.C. 240 at 244 and 262.

[32] *op. cit.*, at p. 284.

[33] *op. cit.*, at p. 258.

[34] *Acton* v. *Blundell* (1843) 12 M. & W. 324 at 353; *Johnston* v. *Johnston* (1817) 1 Phil. 447 at 475.

[35] See pp. 22–4, *ante*.

[36] [1916] 1 A.C. 486 at 514.

[37] [1914] A.C. 398 at 432.

[38] *ibid.*, at p. 435.

In *Taylor* v. *Caldwell*[40] Blackburn, J., said that the civil law offered 'great assistance in investigating the principles on which the law is grounded.' And in *Acton* v. *Blundell*[41] Tindal, C.J., put the same view in this way: 'The Roman law forms no rule, binding in itself, upon the subjects of these realms, but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law.'

In the last two cases the English court reaches a decision on principle where there is no direct English authority. It then resorts to the Roman law in order to show that the Romans reached the same conclusion and therefore that the English decision must be sound in reason. In other cases, however, the courts have gone further. For they have even suggested that the Roman law rule itself can be adopted where there is no direct English authority on a point at issue.[42]

It is also possible to apply the Roman law by way of analogy. As we have seen, Lord Simonds preferred that construction in the *Metliss* case.[43] As Simonds, J., he also relied upon analogy

[39] (1868) L.R. 3 C.P. 427 at 437.
[40] (1863) 3 B. & S. 826 at 835.
[41] (1843) 12 M. & W. 324 at 353.
[42] See, *e.g.*, *Johnston* v. *Johnston* (1817) 1 Phil. 447 at 475.
[43] [1957] 3 W.L.R. 1056 at 1062.

in *Re Knapton.*[44] The testator bequeathed a house to each of his nephews and nieces. The question was, which beneficiary should have which house. No English authority could be cited. But the judge said that it occurred to him, 'from a rather hazy recollection, that there was something in the civil law which might perhaps be of some assistance.'[45] He adjourned the case to enable counsel to make a search of the matter. They found 'at least an analogy, if nothing more' in *Inst.* 2, 20, 33. If several legatees were told to select one of the testator's slaves, and they could not agree in their choice, lots should be drawn. It was held that the Roman law should apply by analogy, and the judge saw nothing immoral or extraordinary in deciding by lot.

In several cases, Roman law has been used in order to illustrate the English law principle. Thus in *Frogmorton* v. *Holyday*[46]—a decision on the application of the double substitution rule—Lord Mansfield referred to a question pleaded by Scaevola and Crassus in the case of *Curius* v. *Coponius* in the days of ancient Rome and much agitated in modern times in *Jones* v. *Westcombe.*[47] The Roman case was reported by Cicero. In *Smith* v. *Hughes*[48] counsel for the plaintiff also referred to a case mentioned by Cicero with regard to the difference between concealment and mere silence as to a material fact. Kerly, although he belittles the debt of English equity to Roman law, points out that references to the Digest and the later civilians were occasionally used as illustrations.[49] The editor of the reports of Lord Nottingham's time annotated them with reference to Roman law rules. 'It was the fashion,' Kerly added, 'to trace prominent doctrines to the older law.'

It may be that the English courts will even allow the citation of Roman law texts to throw light on the meaning of doubtful passages in English law. That view was put forward somewhat casually, by Lord James of Hereford in *Durant's* case[50]; but since he could not discover any doubts requiring solution in the English law on the case before him he could see no point in discussing the Roman law.

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[44] [1941] Ch. 428.
[45] *ibid.*, at p. 432.
[46] (1765) 3 Burr. 1624.
[47] (1738) 1 Eq.Cas.Abr. 245.
[48] (1871) L.R. 6 Q.B. 597 at 600.
[49] D. M. Kerly, *History of Equity* (1890), p. 189.
[50] [1901] A.C. 252.

LIMITATIONS ON THE APPLICATION OF ROMAN LAW

There are certain limitations on the application of Roman law rules in common law courts—

1. The Roman rule can be applied only where the common law is silent. So in *Re Knapton*[51] counsel argued, though unsuccessfully, that by English law the gift in question was void for uncertainty, and therefore the English law was not silent and Roman law could not apply. The classical statement is probably that of Sir John Nicholl in *Johnston* v. *Johnston*[52]: 'The civil law is certainly no binding authority in this country; it is received where the law of England is silent, and where it is not at variance with the spirit and principles of the law of England; and when it furnishes a sound rule of equity and substantial justice: at all times, however, it has been adopted with great caution and jealousy.' Sir John Nicholl was certainly cautious. But so are modern judges. They do not accept a Roman law rule simply because the Romans were clever enough to invent it or because they venerate its antiquity. They still examine its quality. And even if in the abstract its quality may be good the judges still try to find out whether the Roman rule is suitable to meet a modern set of facts—and that is the next limitation on its application.

2. The Roman law rule must be capable of fitting the conditions of the age in which it is sought to apply it. Thus, in *Ward* v. *Turner*[53] counsel for the defendant set forth the circumstances in which a Roman law gift could be said to be in contemplation of death. He included the case of a man going on a journey but added that that was formerly more hazardous than now. On this adaptation of rules to modern facts there is an interesting exchange between counsel and judge in *Acton* v.

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[51] [1941] Ch. 428 at 429.
[52] (1817) 1 Phil. 447 at 475–6.
[53] (1752) 2 Ves. 431 at 435.

Blundell.[54] The question there was whether the plaintiff had the right to draw off percolating water flowing in an undefined channel where the result would be to cause damage to the defendant. Counsel for the plaintiff had referred to a text of the Roman jurist Marcellus in *D.* 39, 3, 1, 12. Maule, J., said: 'It appears to me that what Marcellus says is against you. The English of it I take to be this: if a man digs a well in his own field, and thereby drains his neighbour's, he may do so unless he does it maliciously.' To that counsel replied: 'His language is to be construed according to the state of things at the period he used it. Mining was then altogether unknown, at least on the scale and with the means now applied to it. He meant, therefore, probably, digging a well in order to obtain access to the stream, that he might use it for occupation purposes. . . . Such case, however, is very different from that in the present case, where by means of steam-engines, etc., the defendants continually abstract water from the plaintiff's land. That the Romans knew little about cutting off or using underground currents of water appears from their use of aqueducts.' To that Maule, J., rejoined: 'That is not conclusive; it is certain they, in some instances, used water-pipes for their dwelling-houses.' The moral is that if you want to quote Roman law to a judge, you should go into court armed with more than the Digest. Take a book on Roman social and economic history with you! You may need to show the judge that the facts on which the Roman jurists operated were the same as, or different from, the facts in the case you are arguing to-day. A recent instance of a possible misalliance between Roman law and modern facts occurred in *Re Ellenborough Park.*[55] The Roman jurist Paulus had said that you cannot have an easement which consists in a right to walk about another's land. A right of way—a right to walk *across*—is an easement. A *jus spatiandi*—a right to walk *about*—is not an easement. In several *obiter dicta,* Farwell, J., had said that the *jus spatiandi* could not therefore exist in English law because most of our modern law of easements comes from the Roman law of servitudes. In *Re Ellenborough Park* the question arose whether the owners of houses around a park could have an easement to use the park as a private pleasure ground, where presumably they could sit and walk wherever they pleased. The Court of Appeal held that there could be such an easement. Lord Evershed, M.R., said[56]: 'It by no means follows that the kind of right which is here in question, arising out of a method of urban development that could not have been known to Roman lawyers, can in any case be said to fall within its scope,' *i.e.*, within the scope of the Roman *jus spatiandi*.

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[54] (1843) 12 M. & W. 324 at 336.

[55] [1956] 1 Ch. 131.

3. The mere fact that English law has adopted a Roman doctrine or institution does not mean that all the Roman law rules applicable to that doctrine or institution also apply in English law. This has frequently been stressed by both writers and judges. In 1936 Holdsworth wrote[57]: 'Many different doctrines of the common law have been influenced by Roman law; but the Roman doctrines thus received have never been continuously developed on Roman lines. They have been naturalised and assimilated into the English legal system, and have thus helped that system to develop to meet new needs on its own lines.' Lord Lindley makes the same point with regard to ratification in *Durant's* case[58]: 'Historically that doctrine is no doubt derived from the Roman law; but it has been extended and developed in this country conformably to our own legal principles and to meet our own commercial necessities.' So too does Lord Selborne with regard to prescription in *Dalton* v. *Angus*[59]: 'Though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, . . . yet . . . every system of law is founded on its own ideas of expediency, and . . . we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.' In 1949 Denning, L.J., in *Re Wingham*[60] rejected the view that, because English law had

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[56] *ibid.*, at p. 163.

[57] *Essays in Law and History* (1946), at p. 189.

[58] [1901] A.C. 240 at 262.

[59] (1881) 6 App.Cas. 740 at 822.

[60] [1949] P. 187 at 195. On this case, see 'Actual Military Service,' by the present writer (1949) 61 *Juridical Review*, p. 172.

borrowed the idea of a soldier's privileged will from Roman law, it followed that English law had also adopted the Roman test as to when the soldier was on actual military service. Nevertheless, though all the Roman rules may not be applicable to the modernised Roman institutions it does not follow that they must all be rejected simply because they were the Roman rules: some of the rules may be appropriate even in modern times.

Once a Roman law rule has been incorporated in a binding judicial decision—or of course in a statute—it is binding thereafter on the court. That is obvious. Usually the courts put the matter negatively—they say that the Roman rule is not binding on the court until it has been incorporated into a statute or a judicial decision.

THE EFFECT OF ADOPTING ROMAN LAW

What is the result of this incorporation? Pollock stated his view in this way[61]: 'It is obvious that, as our modern authorities become fuller, cases where it is needful or desirable to recur to the *Corpus Juris* are less and less likely to present themselves. Even in jurisdictions which as a matter of history are outside the common law, for example in Admiralty cases, the general usage is now not to go beyond our own reported decisions.' Lee used similar terms about Roman law in South Africa and in Scotland[62]: 'The Roman law in South Africa is dissolving gradually into South African law. I dwell upon these facts because they spell the doom of the use of the Roman law in the courts of South Africa, just as similar influences have proved fatal to it in Scotland. . . . Every application of the Roman law in the courts of South Africa hastens the day when the Roman law will no longer be applied.'

Of course it is true that every new lesson which a mother teaches her child hastens the day when the child will become independent of its mother. But much depends on the range of the mother's knowledge and experience and on the range of circumstances to which the child will be subjected. In spite of its abridgement in the *Corpus Juris* there is still a great quantity of Roman law; and much of it has not yet come before a common law court because the occasion has not yet arisen for its consideration. Nor is it certain that Roman rules can no longer be applied directly or by analogy to new sets of facts. Roman law is not entirely like those insects which bring death on themselves at the moment they fertilize their mates. It still has an abundance of unexhausted potency, capable of renewed virility when it encounters the necessary stimuli. One stimulus is already to be found in the increased intercommunication between law teachers and practitioners of different states leading to a renewed attention to the comparative study of law, and especially to the study by common lawyers of those systems which derive more closely from the Roman law. A second stimulus lies in the application of the rules of one of these latter systems as the proper law to be applied even in a common law court, *e.g.*, where the proper law of a contract is not English law but French or German or Italian or Spanish law. A third stimulus will be found in international courts, tribunals or panels of arbitrators where common lawyers and civil lawyers sit together. The Board of Review which sat in Germany after the Second World War was composed entirely of common lawyers sitting as a court of appeal from a court of civil lawyers.[63]

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[61] F. Pollock, *First Book of Jurisprudence* (6th ed. 1929), p. 351.

[62] R. W. Lee, 'Roman Law in the British Empire, etc.' (1935) *Atti del Congresso Internazionale di Diritto Romano, Bologna,* II, p. 253 at pp. 256–7. The same view was recently expressed by the late Professor Lee in 'The Disappearing Roman Law' (1957) 74 *South African Law Journal,* p. 79.

So we return to our ancestor, the Roman law. Ancestors are sometimes an embarrassment and often it is difficult to know what to do with them. In Sheridan's play *The Rivals* one David says to his master[64]: 'Our ancestors are very good kind of folks; but they are the last people I should choose to have a visiting acquaintance with.' I prefer the inadvertent wisdom of Mrs. Malaprop later in the play[65]: 'No delusions to the past.' It is a delusion to believe that the laws of the past have no value for the present merely because they were originally begotten and

[63] E. J. Cohn, 'The Board of Review' (1955) 4 *International and Comparative Law Quarterly*, p. 399.

[64] Act 4, Scene 1.

[65] Act 5, Scene 3.

developed in an earlier society. The growth of civilisation has little connection with the mere advance of either time or knowledge. And enough has happened in this century to make us doubt whether our capacity for reason or for gentleness and good faith in human relations has necessarily progressed upwards all the time with no trace of recession. The civilisations of the past were often in advance of those which succeeded them. Their laws can still be of service not only for their intrinsic merit but also as standards by which modern legal norms can be judged in comparison.

3

TRIAL BY NEWSPAPER

GEORGE J. WEBBER

THE trial for murder of Dr. John Bodkin Adams on March 18, 1957, has raised a constitutional issue on which opinion is likely to be keenly divided. Devlin, J., with the approval of Lord Goddard, L.C.J., summing up at the Old Bailey, declared that it would have been wiser if the proceedings in the magistrates' court had been held *in camera*.[1] On April 15, 1957, the Home Secretary appointed a Departmental Committee under the Chairmanship of Lord Tucker,

> 'to consider whether proceedings before examining justices should continue to take place in open court and, if so, whether it is necessary or desirable that any restriction should be placed on the publication of such proceedings; and to report.'[2]

Before the justices the prosecution had tendered evidence about other patients, the admissibility of which was challenged. Counsel asked that such evidence be heard *in camera*; the request was refused and the justices heard the evidence in public. It was widely printed in the national press, being read in all probability by the jury. At the trial the prosecution decided not to tender the evidence.

Already a century ago, Parliament had conferred a discretion to sit in private, which should and could be used; the purpose of the institution of preliminary proceedings was for the benefit of the accused. Examining justices shall not be obliged to sit in open court.[3] In general, it may well be thought, these proceedings should continue to be held in public unless, for good cause, the magistrates think otherwise. It may be desirable to enact that in a prosecution for murder or for an offence involving fraud or accounts the preliminary proceedings should be held *in camera*. 'It would be, I think,' said Devlin, J., 'a very unfortunate thing if proceedings which were designed for the benefit of the accused could indirectly result or may turn out to the prejudice of his interests.'[4]

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[1] *The Times*, April 9, 1957.

[2] *The Times*, June 7, 1957. These were the amended terms of reference. The earlier terms had omitted the consideration of hearings *in camera*.

[3] Magistrates Courts Act, 1952, s. 4 (2), replacing Indictable Offences Act, 1848, s. 19. In 1894, the Law Officers advised the Home Secretary (Mr. H. Asquith, Q.C.) that magistrates investigating a charge of an indictable offence were not 'hearing, trying, determining or adjudging' a case and were, therefore, not bound to examine the witnesses in open court: (1894) 58 J.P. 722.

VIEWS OF THE PRESS

On May 1, 1957, the Press Council issued a reasoned six-point statement in favour of publicity and unrestricted reports,[5] which Professor L. C. B. Gower has incisively examined.[6] The Chairman of the Press Council, in a later statement endorsed by the Council, strongly condemned anything suggestive of secret court hearings and questioned whether justices are qualified to decide whether hearings should be in open court or in public.[7]

The Institute of Journalists, in a memorandum to the Tucker Committee, point to the time lag between committal and trial, the proverbial brevity of memories and the existence of the right of appeal.[8] (The right of appeal does not meet the issue and memories are long no less than short.) In the view of the Magistrates' Association there should be no general ban on press reporting but magistrates should have the power to direct that certain parts should not be published. On the other hand, the Howard League for Penal Reform recommend no publicity for committal proceedings except at the request of the accused or where no case has been found.[9]

SCOPE OF THIS PAPER

The issue now joined between the Press and those who think otherwise is fundamental and may constitute a current legal problem of 1958. It appears appropriate to see how the problem is at present dealt with in England and elsewhere. I propose, therefore, *first,* to examine the position of the press in England in relation to pending trials, and its control by the courts; *secondly,* to contrast the outlook in the United States; *thirdly,* to point out the different approach in Scotland; *fourthly,* to investigate the recent experiment in Northern Ireland and *finally,* in the light of this survey, to ask what reform in the present law is required in England.

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[4] See 'Preliminary Hearings in Magistrates' Courts' [1957] *Crim. L.R.* p. 277, at p. 278.

[5] *The Times*, May 2, 1957.

[6] 'The Aftermath of the Adams Case,' (1957) 20 M.L.R. 387–91.

[7] *The Times*, October 24, 1957.

[8] *The Times*, October 25, 1957.

[9] *The Times*, September 24, 1957.

I. ENGLAND: THE PRESS AND PENDING TRIALS

Trial by newspaper as an institution does not exist in England. Any comment by a newspaper upon a matter *sub judice,* seriously prejudicial to a fair trial is swiftly and sternly visited by proceedings for contempt upon the editor and the proprietor before a Divisional Court of the Queen's Bench Division. This court is in a special manner, said Darling, J., in 1910, the guardian and protector of public justice throughout the kingdom.[10] A fine of £200 with costs was imposed and a sentence of imprisonment until the fine was paid. In 1943, the Court of Criminal Appeal quashed a conviction for larceny where a list of preliminary convictions had been read out before the magistrates to enable them to decide whether to deal with the case summarily and a local newspaper, in its report of the preliminary proceedings, had published the list.[11] On the other hand, in 1951, where a person had been sentenced at Surrey Quarter Sessions to four years' corrective training for larceny and his previous convictions had been mentioned before trial in the Surrey newspapers, the Court of Criminal Appeal declined to infer either that the jury had read the report, or that they were biased. The court, said Lynskey, J., had no power to compel the press, but it was 'very undesirable' that such information should be given.[12]

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[10] *R.* v. *Clarke* (1910) 103 L.T. 636 at 640. For a concise statement of the law and of the authorities see Halsbury, *Laws of England* (3rd ed. 1956), Vol. 8, pp. 6–11, and in particular p. 9, note (1); p. 10, note (5) and p. 11, note (e).

[11] *R.* v. *Dyson* (1943) 169 L.T. 237.

[12] *R.* v. *Armstrong* [1951] 2 All E.R. 219.

THE HAIGH CASE

In 1949, while one Haigh was in custody on a charge of murder, three separate issues of the *Daily Mirror* were published containing articles, photographs and headlines in the largest type. He was described as a vampire and other murders were laid at his door. The editor was committed to prison for three months and the proprietor fined £10,000. 'Let the directors beware,' the court concluded. 'If for the purpose of increasing the circulation of this paper they should again venture to publish such matters as this, the directors themselves might find the arm of this court was long enough to reach them and deal with them individually.'[13]

TRIAL BY NEWSPAPER

In 1924, 'Trial by Newspaper' first raised its head in England and for more than thirty years—save in the *Haigh* case—hardly raised it again until the present time.[14] The *Evening Standard* employed amateur detectives to investigate a murder in Eastbourne. The results of the investigations were published in several articles with photographs and an account of the married life of the accused. The murder of a young girl by dismemberment had attracted great public interest. A later article was headed: 'Another Crumbles Puzzle. Was the girl dead when the letter was posted?' A possible witness had disappeared. The information in the article had been repeated in the London press; the woman being a Manchester girl, the article appeared in the *Manchester Guardian* and the *Daily Express* published the letter. The *Evening Standard* was fined £1,000; the *Daily Express* and the *Manchester Guardian*[15] £300 each, in each case with costs.

Lord Hewart, C.J., said—

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[13] *R.* v. *Bolam & Others. Ex p. Haigh* (1949) 93 S.J. 220.

[14] *R.* v. *Evening Standard. Ex p. Director of Public Prosecutions* (1924) 40 T.L.R. 833.

[15] 'Even Homer sometimes nodded,' said Mr. W. A. Jowitt, K.C., for the *Manchester Guardian*. During the whole editorship of Mr. C. P. Scott, extending over 50 years, there had been no similar complaint of contempt of court (at p. 835).

> '. . . it had come to be somehow for some reason the duty of newspapers to employ an independent staff of amateur detectives, who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence.'[16] 'A perilous enterprise' indeed, he declared this kind of publication to be.
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> 'It might be that a date, a place, or a letter, or some other one thing which, considered in itself, looked trivial, might prove in the end to be a matter of paramount importance. It was impossible to foresee what was important.'

Lord Hewart referred to two cases. In *R.* v. *Payne*[17] Lord Russell of Killowen, C.J., said: 'The applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending.' In that case, a dictum was quoted of Cotton, L.J., from *Hunt* v. *Clarke*,[18] that the thing done must be 'of such a nature as to require the arbitrary and summary interference of the court in order to enable justice to be duly and properly administered without any interruption or interference.'

In *R.* v. *Parke*[19] the judgment of the court delivered by Wills, J., deals historically with the newspaper cases where the court had committed for contempt. He declared—

> 'Before the Law of Libel Amendment Act, 1888, the publication of proceedings before magistrates preliminary to a committal to assize or quarter sessions was at least of doubtful legality. . . . It was considered at least until 1858 that the inevitable tendency of such a publication was to have the case tried, so to speak, in the minds of persons who might be jurors before they came into court: *Rex* v. *Fisher* (1811) 2 Camp. 563 . . .'

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[16] *ibid.*, at p. 835.

[17] [1896] 1 Q.B. 577 at 580.

[18] (1889) 58 L.J.Q.B. 490 at 492, where the court did not commit; the contempt was technical and would not be likely to have substantially prejudiced the parties in the civil action.

[19] [1903] 2 K.B. 432 at 438: Lord Alverstone, C.J., Wills and Channell, JJ.

A REPORTER'S MISTAKE

Almost thirty years were to elapse between the first *Evening Standard* case and the second.[20]

'Trunk Trial Story of Marriage Offer—Husband is Accused' was the caption on the front page, reporting the trial of a prisoner at Chelmsford for the murder of his wife whose body had been discovered in a trunk. Mrs X, it was stated, had said at the Assizes that a man, accused of murdering his wife, had asked her to marry him. *Mrs. X* had not, in fact, given that evidence. Before the examining justices *Mrs. Y* had given evidence that, after the death of his wife, the prisoner had asked her to marry him, but, at the trial, when Mrs. Y had begun to give evidence, the judge had ruled, in the absence of the jury, that this evidence, being highly prejudicial to the prisoner, should not be given. Neither Mrs. X nor Mrs. Y gave any such evidence at the trial.

The reporter had been present before the justices; the report was compiled by the paper from information telephoned by him. During the discussion on admissibility he had left the court to telephone the story; he returned to court after Mrs. Y had completed her evidence.

The next morning counsel for the defence mentioned the report to the trial judge but, through the difficulty of empanelling a jury who had not seen the report, he did not press for a new trial. The prisoner was acquitted. The Attorney-General applied for leave to issue a writ of attachment against reporter, editor and proprietor.

The reporter, a man of long experience, could not explain the mistake. The editor had published in good faith. Editor and proprietor, it was contended, could not be vicariously liable: contempt required a guilty mind.

One of the earliest reported cases on contempt is *The St. James's Evening Post* case: *Roach* v. *Garvan (or Hall)*.[21] That was a motion to commit to the *Fleet* for publishing a libel on executors, taxing them with turning affidavit men, *etc.* in the cause now depending in this court (between Mrs. Roach and the Executors); 'Affidavit men,' meant 'persons who are ready, upon all occasions, to make affidavits, without regarding whether they have any conusance of the facts.' There were three different sorts of contempt, Lord Hardwicke, L.C., declared. The third was

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[20] *R.* v. *Evening Standard Co., Ltd.* [1954] 1 Q.B. 578.

[21] (1742) 2 Atkyns 469; 26 *English Reports* 883 at 885.

> 'in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.'

It was no excuse that the printer had no knowledge of the contents of the paper.

In the *Evening Standard* case of 1954, the summary jurisdiction of the court, said Lord Goddard, should only be invoked and would only be exercised 'in cases of real and serious moment'; a motion to attach was deprecated where there had not really been 'a serious interference with justice.'[22] Here, there might have been 'a disastrous interference with justice.' True, no intentional interference; nor was any moral blame to be attached to the editor. These were 'mitigating circumstances.' The court however rejected the view that editor and proprietor could not be vicariously liable as contrary to the principle laid down by Lord Hardwicke, Lord Russell of Killowen and Wills, J. No penalty was imposed on editor or reporter but the company was fined £1,000 and costs, payable within forty-eight hours.

HIGH WATER-MARK OF CONTEMPT

The amateur detectives of 1924 were superseded by the 'experienced crime reporter and investigator' of 1957.[23]

M, arrested and charged with keeping a brothel, was committed for trial to the London Sessions. On the Sunday before the case, *The People* published an article with photographs, headed 'Arrest this beast.' The paper had been publishing a series of articles on prostitution and brothel-keeping. A list of

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[22] [1954] 1 Q.B. 578 at 584.

[23] *R. v. Odhams Press Ltd. & Others. Ex p. Att.-Gen.* [1957] 1 Q.B. 73 at 78.

M's previous convictions was given, apparently exaggerated tenfold. The respondents said they did not know of the pending proceedings—a contention, which after cross-examination, the Attorney-General accepted.

'Anything more calculated to prejudice a fair trial could not well be imagined,' said Lord Goddard, C.J. With a circulation of four million copies a week, there was 'a strong probability' that the articles would be read by some of those summoned as jurors. In the *St. James's Evening Post*[24] case the publisher, who was not aware of the contents of the paper, was committed to the *Fleet*. Following that case, Lord Erskine, L.C., in *Ex p. Jones*[25] had also held that ignorance of the contents of a pamphlet would not excuse a printer from contempt.

These cases, said Lord Goddard, were conclusive that *mens rea* need not be present to constitute contempt though its absence would be material on penalty—

> 'The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame.'[26]

Palles, C.B., had taken the same view in *Rex* v. *Dolan*: 'actual intention to prejudice is immaterial.'[27] And in *R.* v. *Parke* Wills, J., had said—

> 'It is possible very effectively to poison the fountain of justice before it begins to flow.'[28]

A newspaper, said Lord Goddard, may expose and comment upon conduct believed to be fraudulent or criminal but such comment should be made 'with proper restraint,' excluding matter inadmissible at the trial.

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[24] (1742) 2 Atkyns 469.

[25] (1806) 13 Ves. 237; 33 *English Reports* 283 at 284.

[26] [1957] 1 Q.B. 73 at 80. In *Metropolitan Music Hall* v. *Lake* (1889) 58 L.J.Ch. 573 at 576, Chitty, J., had held that ignorance of the proceedings did excuse comment upon a company's affairs and in *Re Marquis Townsend* (1906) 22 T.L.R. 341, Collins, M.R., stressed knowledge as a constituent. In those cases the court did not consider the contempt sufficiently serious and, in any event, those cases did not qualify the principle in the *St. James's Evening Post* (see *per* Lord Goddard, [1957] 1 Q.B. 73 at 82, 83).

[27] [1907] 1 I.R. 260 at 284.

[28] [1903] 2 K.B. 432 at 438.

> 'It is a perilous adventure which they undertake at their own risk.'[29]

The court ordered the company to pay a fine of £1,000 within seven days; editor and reporter were each fined £500. It is a rule of law that 'the editor takes responsibility for what is published in his paper.'[30]

INNOCENT DISSEMINATION

The prosecution of Dr. Adams led to contempt proceedings which have judicially extended the law. Innocent dissemination of a foreign publication, it has been held, is no defence: the distributors, who are the only persons amenable to the English courts, are responsible.[31]

While the long trial for murder was still proceeding, *Newsweek,* a foreign weekly magazine containing paragraphs highly prejudicial and matters some of which had not been given in evidence, was on sale on the bookstalls. The paper was owned by a company in Ohio who published a European edition compiled in New York, printed in Amsterdam and thence distributed by air. There was a London office but no responsible editor or manager. The circulation manager lived in Paris; the senior representative in London was its chief European reporter, one, Griffiths, who collected news items in England which he cabled to New York. Of the contents of the magazine he knew nothing until he saw the copy on arrival here. Rolls House had been importing and distributing the magazine; for twenty years it had also been distributed by W. H. Smith & Son Ltd. Neither knew that this number contained the paragraphs. As soon as they heard, they called in the copies and stopped the circulation. In proceedings for contempt, Griffiths contended that he had neither published, nor caused to be published, nor distributed the paper. The distributors submitted that they were innocent disseminators; they had no notice of the contents nor had they been put on guard.

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[29] [1957] 1 Q.B. 73 at 81, citing from Lord Hewart's judgment in (1924) 40 T.L.R. 833 at 835.

[30] [1957] 1 Q.B. 73 at 83, citing *R.* v. *Evening Standard Co., Ltd.* [1954] 1 Q.B. 578 at 585.

[31] *R.* v. *Griffiths. Ex p. Att.-Gen.* [1957] 2 Q.B. 192.

Griffiths, it was held, was not responsible: 'the jurisdiction to punish for improper comment on pending proceedings . . . ought not to be vicariously extended because the real offenders are outside the jurisdiction.'[32]

The distributors had relied upon the defence of innocent dissemination based on *Emmens* v. *Pottle*.[33] But 'Cases of contempt,' the court said, 'by the publication of matters tending to prejudice a fair trial stand in a class of their own and are not truly analogous to cases of defamation.'[34] In *R.* v. *Odhams Press Ltd.*[35] the court, reviewing the decisions, had held that neither lack of knowledge of the contents, nor lack of intention, was a defence. The court imposed a nominal fine of £50 upon each of the distributing companies 'to emphasise the risk run by dealing in foreign publications, imported here which have no responsible editor or manager in this country.'

RECENT CONTEMPT

At the end of a long trial, during the Autumn 1957 Assizes at Newcastle upon Tyne, of two men who had escaped from Wormwood Scrubs Prison in November 1956, and were found guilty of conspiracy to defraud, Barry, J., observed that on the first day, a local evening paper had issued a statement 'which would seem at least to constitute a very serious contempt of court.' Publication in other circumstances might, he continued, have given rise to the discharge of the jury and the retrial elsewhere with the attendant expense, of a long case. The editor had sent an apology which, with the publication, the learned judge had sent to 'the appropriate authorities.'[36]

On November 6, 1957, during the Autumn Assizes at Exeter, Salmon, J., stopped the trial of one Oliver for the alleged murder of his wife, the *Daily Telegraph*, the *Daily Express* and the *Daily Sketch* having reported things as having been said which had, in fact, not been said and which might be grossly prejudicial to a fair trial. Apologies by leading counsel instructed on behalf of those national newspapers and the Press Association were made the next day. The reporter had not been present in court himself and his report to the Press Association was based upon notes taken by two of his colleagues, one of whom had in his possession reports of the preliminary proceedings. Salmon, J., said the matter was 'extremely grave'; the trial was so prejudiced that it had to be abandoned. Even the ultimate trial might possibly be prejudiced by the reports. Two witnesses would have 'to undergo the harrowing experience of giving their evidence all over again'; much public time and money was wasted. The trial was adjourned to Winchester Assizes in March 1958.[37] On a motion by the Attorney-General, the Divisional Court ordered the case to be tried at the next session of the Central Criminal Court.[38] Counsel for the defence, relying on *R.* v. *Clement*,[39] asked for an order that no report of the proceedings in the Divisional Court should be published until the completion of the trial, but the court did not see fit to make the order.

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[32] At p. 202.
[33] (1885) 16 Q.B.D. 654.
[34] [1957] 2 Q.B. 192 at 203, 204.
[35] [1957] 1 Q.B. 73.
[36] *The Times*, October 18, 1957.

Although trial by newspaper does not exist as an institution in England, instances do occur from time to time—despite the warnings of the Divisional Court—when even experienced reporters rely in part upon the account of the preliminary proceedings as a source for the report of the trial. Can it really be right that a man on trial for murder—or, indeed, for any offence—should be prejudiced in this way, or that even the possibility of prejudice should appear, with the consequence that a trial must be postponed and evidence taken again?[40]

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[37] *The Times*, November 6 and 7, 1957.

[38] *The Times*, *R.* v. *Oliver*, November 26, 1957.

[39] (1821) 4 B. & Ald. 218.

[40] In *Re The William Thomas Shipping Co.* [1930] 2 Ch. 368 at 376, 373, Maugham, J., made some significant observations on the differences of approach to contempt by a common law judge and by a Chancery judge. The common law judge is mainly thinking of the effect on the jury and the witnesses. A Chancery judge 'starts on the footing that only in the rarest possible case is it likely that the publication by a newspaper (of statements in a pending case) will affect the course of justice in the sense of influencing, altering or modifying the judgment or judgments which the court will ultimately have to deliver.'

II. TRIAL BY NEWSPAPER IN THE U.S.A.

At the Eightieth Annual Meeting of the American Bar Association held in London in July 1957, 'Publicity Attendant Upon Trials' was selected as one of the topics for discussion. The two Papers read, one by Richard P. Tinkham, a former Governor of the American Bar Association and the other by Elisha Hanson, Counsel for the American Newspaper Publishers, must have given English lawyers no little surprise and may have filled not a few journalists with longings for the freedom of the farther shore.

Since *Bridges* v. *California*,[41] Mr. Tinkham points out, State courts have no power to punish for contempt those publications which do not present a 'clear and present danger' to the impartial administration of justice. 'Does this freedom,' he asks, 'affect the administration of justice to the extent that fair and impartial trials are not possible?' Strong opinions are held on both sides. 'I am frank to say,' he answers, 'that I do not know for certain.' He cites a recent observation of an able editor: 'They (the newspaper men) know that the media of mass communication which literally blanket whole areas today can create—and have created—conditions in which a fair trial is virtually impossible.'[42]

Mr. Elisha Hanson observes that both in the Federal Constitution and in the constitution of each of the forty-eight states, the rights to a free press and to a fair and public trial are guaranteed. For a century after the First Amendment guaranteeing a free press, the courts punished for contempt publications having 'a reasonable tendency' to disturb the fair and impartial administration of justice. In 1941, the Supreme Court—Mr. Hanson rejoices—'relegated the reasonable tendency test to the limbo of the past.'[43] Judges now appear to be giving more consideration to the *voir dire* of jurors to determine whether they have formed fixed opinions, to the defendant's right to a 'cooling-off period' between preliminary publicity and the beginning of the trial, to the removal of the case to a district court and to their directions to the jury.[44] Judges apparently disagree on the effect of pre-trial publicity. One dissenting circuit judge observed—

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[41] 314 U.S. 252 (1941).
[42] At p. 6 of Mr. Tinkham's *Paper*.
[43] At p. 6 of Mr. Hanson's *Paper*, citing *Bridges* v. *California*, *supra*.
[44] *ibid.*, at p. 9. See Sir Patrick Devlin, *Trial by Jury*, 1956, pp. 32–4.

> 'My colleagues admit that "trial by newspaper" is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways).'[45]

The late Mr. Justice Jackson of the Supreme Court declared—

> '. . . The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practising lawyers know to be unmitigated fiction.'[46]

The American problem, Mr. Hanson concludes, is not how to suppress pre-trial publicity, but how to preserve the essentials of both: the right to a free press and the right to a fair trial.

BRIDGES V. CALIFORNIA

In *Bridges* v. *California*[47] the two points of view on 'Trial by Newspaper' are stated freely and at length. 'Reasonable tendency' to interfere with the administration of justice will not establish contempt: the 'clear and present danger' cases indicate that the evil likely to result must be 'extremely serious' and 'the degree of imminence extremely high' before utterances can be punished. Two union truck drivers had just been convicted of assaulting a non-union truck driver. An editorial in the *Los Angeles Times* read—

> '"Probation for Gorillas? Judge A. A. Scott will make a serious mistake if he grants probation to Mathew Shannon and Kenneth Holmes. This community needs the example of their assignment to the jute mill" (meaning, we surmise, the penitentiary at San Quentin).'[48]

To regard this as a substantial influence on the course of justice would be 'to impart to judges a lack of firmness, wisdom or honor . . .'[49] So the majority of five judges held, their opinion delivered by Black, J.

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[45] *ibid.*, cited from *United States* v. *Leviton et. al.* 193 F. 2d, 848 at 865, (1951) (Judge Jerome Frank).

[46] *ibid.*, cited from *Krulevitch* v. *United States* 336 U.S. 440 at 453 (1949). *Cf.* an observation by Lord Justice Parker, Chairman of the Bank Rate Tribunal:—'. . . We all know it is no good telling a jury to put some bit of evidence entirely out of their minds. I do not think a judge can be trusted to put something out of his mind. It is a very difficult thing to do': *The Times*, December 12, 1957.

[47] 314 U.S. 252 at 263, 272 (1941).

[48] At p. 272.

[49] At p. 273.

The minority consisted of Stone, C.J., Frankfurter, Roberts and Byrnes, JJ., and on their behalf, Frankfurter, J., delivered a long and notable opinion. He cites from the judgment of Darling, J., in a motion arising out of the trial of Crippen for the murder of his wife. Crippen was arrested in Quebec on July 31. On August 5 an article appeared written by a newspaper's special correspondent in Quebec containing both an alleged confession and intimations of the defence. At the time of the article, no information had been laid against Crippen and warrants were out for his arrest, but not until August 27 was he charged at Bow Street. Darling, J., said—

> 'We are determined . . . to do nothing to substitute in this country trial by newspaper for trial by jury; and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it.'[50]

The State Court of California, said Frankfurter, J., was justified in treating the offending editorial (admonishing a judge, who within a year, would come up for re-election), as a threat to impartial adjudication. Judges, no less than juries, may be 'impregnated by the environing atmosphere.'[51] Comment after sentence is an exercise of the right of free discussion.[52]

> 'But to deny the States power to check a serious attempt at dictating, from within, the sentence to be imposed in a pending case, is to deny the right to impartial justice . . .'[53]

Bridges v. *California*[54] was followed by *Pennekamp* v. *Florida*.[55]

'It is idle for [such] newspapers to claim'—Frankfurter, J., is quoting the words of Blair, J., in the High Court of New

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[50] *R.* v. *Clarke. Ex p. Crippen* (1910) 103 L.T.N.S. 636 at 640.

[51] 314 U.S. 252 at 299, citing Holmes, J., in *Frank* v. *Mangum* 237 U.S. 309 at 349.

[52] See *per* Lord Atkin in *Ambard* v. *Att.-Gen. for Trinidad and Tobago* [1936] A.C. 322 at 335.

[53] 314 U.S. 252 at 300.

[54] 314 U.S. 252 (1941).

[55] 328 U.S. 331 (1945) at 355. Frankfurter, J., cites from a weighty and closely reasoned judgment of Humphreys, J., in *R.* v. *Davies* [1945] 1 K.B. 435 at 442, 443: '. . . I think it is a fallacy to say or assume that the presiding judge is a person who cannot be affected by outside information.'

Zealand—'that they adopt such practices in the public interest. Their motive is the sordid one of increasing their profits . . .'[56]

In one of the notes to Frankfurter, J.'s judgment in *Pennekamp* v. *Florida,* a remarkable sentence is cited from Clemence Darrow, one of the most experienced criminal lawyers—

> 'Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases.'[57]

In *Craig* v. *Harney*[58] the Supreme Court held, by a majority, that an unfair report of a pending case, together with an editorial vehemently attacking the trial judge while a motion for a new trial was pending, did not, in the circumstances, constitute a 'clear and present danger' to the administration of justice. A conviction for contempt violated the freedom of the press guaranteed by the First and the Fourteenth Amendments. Frankfurter, J. (and with him Jackson, J.) dissented.[59]

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[56] *Att.-Gen.* v. *Tonks* [1934] N.Z. L.R. 141 at 148, 150.

[57] 328 U.S. 328 (1945) at 363, note 11.

[58] 331 U.S. 367 (1947).

[59] I am grateful to the Librarian of the American Library in Grosvenor Square for drawing my attention to, and for the loan of, the following: Victor J. Danilov, *Public Affairs Reporting,* Macmillan, New York (1955); James Russell Wiggins, *Freedom or Secrecy,* Oxford University Press, New York (1956); A. T. Burch, *The Press and the Administration of Justice. Trial by Newspaper,* in *Vital Speeches of the Day,* December 15, 1954, Vol. 21, No. 5, pp. 916–20; Herbert Brownell, Jr. (Attorney-General of the U.S., as he then was), *Fair Trial with a Free Press. The Public's right to News and the Individual's Right to Justice,* in *Vital Speeches of the Day,* October 15, 1954, Vol. 21, No. 1, pp. 793–6.

Danilov, *op. cit.,* p. 108, declares: '. . . the courts rarely exercise their prerogative against the press. Once again this can be attributed to the judges' fear of raising the newspapers' ire. As a result, many newspapers repeatedly comment on pending cases, publicise grand jury testimony, and carry stories which tend to obstruct justice. Most judges overlook such actions by the press unless these are called to their attention by the parties involved.' The most common source of information is the prosecuting attorney (p. 220).

Wiggins, *op. cit.,* p. 50, contrasts the conditions in England with those in the U.S., stating that 'the English experience is hardly relevant to American conditions.' In London, in 1952 there were 19 armed robberies; in Chicago, with less than half the population, no less than 4,400. He regards pre-trial publicity as the prisoner's best protection. In one case only in recent years was a conviction reversed on the ground that the pre-trial publicity prevented a fair trial: *Sheppard* v. *Florida* 341 U.S. 50 (1954).

Mr. A. T. Burch, a distinguished journalist, observes, *op. cit.,* p. 919: 'The English practice assumes a police and court system functioning with almost automatic precision. It does work with an efficiency that presents an amazing contrast with our own.'

III. THE POSITION IN SCOTS LAW

For a completely different outlook let us now turn to Scotland.

> 'There can be no publication of pre-trial proceedings in the English sense because in Scotland pre-trial procedure is quasi-inquisitorial. There is not a "hearing" as in England.'[60]

Pre-trial criminal proceedings are held in chambers in private before the Sheriff. Only the court officers, police escort, Procurator Fiscal, defending agent and accused are present. There have been occasions, however, when the court has had to curb pre-trial publicity.

The earliest reference is in *Hume*. One Gilkie, a writer and an agent for the prosecutor in a murder case in 1777, 'had published sundry memorials and other addresses commenting on the charge and tending to prejudice the public against the person accused.' He was sentenced to one month's imprisonment.[61] Again, in 1785, the agent for the panel had rashly published and circulated in the neighbourhood a sort of narrative on his part, giving an account of the charge and the circumstances of the case. The writer was fined and censured.

Next comes the case of *Edmond* in 1829.[62] He was imprisoned on a charge of murder. An alleged letter to his wife, which was fabricated, was circulated in which he was alleged to have made most inculpating statements. The court granted an order against further publication.[63]

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[60] I cite from a letter to me by Professor T. B. Smith of the University of Aberdeen, to whom I am in gratitude for his kindness in giving me the references and much authoritative information; on all of which, this part of my Paper is based.

See also Lord Normand, 'The Public Prosecutor in Scotland' (1938) 54 L.Q.R. 345–57 at p. 353.

[61] (1844) *Commentaries on the Law of Scotland* with Bell's Notes, Vol. 2, pp. 139–40.

[62] (1829) 1 Shaw, P. 229.

[63] Macdonald, *The Criminal Law of Scotland* (5th ed.), pp. 215–16. 'It is contempt of court for any person to publish comments on a pending trial and a petition may be presented to the court, praying the court to prohibit the publication of any statements relative to the alleged crimes, until the close of the proceedings and the court will prohibit the publication of any prejudicial matter.'

NEWSPAPER AS DETECTIVES

Smith v. *Ritchie*[64] is the *Scots Newspaper-Detective* case. Smith, committed on a charge of forging and uttering certain manuscripts, presented a petition praying the court to prohibit the editor of a newspaper from publishing or circulating statements relative to the alleged crime, which, he averred, were calculated to prejudice his defence. The court, following *Edmond,* granted his prayer.

During November 1892 a series of articles and letters had appeared in the *Edinburgh Evening Dispatch,* entitled 'Great Forgeries of Old MSS.' These articles maintained that original MSS. of Burns, Scott and others had been copied, the authors' names forged and large quantities of spurious documents had been sold to the public as originals and as bearing genuine signatures. 'Album of the Mysterious Smith,' the articles were headed, 'Methods of the Mysterious Smith,' and, more boldly, 'The Story and Confessions of the Forger.' One, A. H. Smith, was named as the forger. His appearance was described; a photograph was given; photographic representations of his admitted handwriting were compared with handwriting in the forged MSS. On December 5 Smith was arrested. On December 7 another article appeared, 'The MSS. Frauds,' with further photographs of Smith's handwriting, compared with the forgeries, and concluding: 'We have come to the conclusion that the facsimile in the counterblast which we give below, represents the doubting weakness of "Antique" Smith and not the strength and certainty of the poetic quill.' On December 9 the series continued with 'MSS. Forgeries.' Lord Trayner put the point concisely—

> 'But the moment the person accused has been apprehended and committed for trial upon the charge brought in the first instance by the newspaper, the duty and the function of the newspaper is at an end. From that time forward the investigation and punishment of the crime belongs to the High Court of Justiciary alone.'[65]

Here is the kernel of the whole problem: the court will bide no other power ruling beside it in its own domain. And that, surely, is right. The techniques and the purposes of the press and the court are totally different.

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[64] (1892) 3 White 408; 20 R. (J.) 62.
[65] 20 R. (J.) 54; 3 White 414.

DIFFERENT FUNCTIONS OF PRESS AND COURT

In the more recent case of *Macalister & Others* v. *Associated Newspapers & Another,*[66] four persons, in November 1953 were committed for conspiracy to further by criminal means the Scottish Republican Army with the intention of coercing Her Majesty's Government in Great Britain into setting up a separate government in Scotland. They presented a petition to the High Court of Justiciary to prohibit the proprietors, publishers and editor of the *Scottish Daily Mail* from publishing any article or comments on the subject matter of the indictment likely to prejudice the prisoners or prevent them from receiving a fair trial and also to prohibit all officers of police from making statements in public or giving evidence to journalists on the matters concerned.

The petition was granted against the newspaper but not against the police, since no particular officers or particular force had been named.

Lord Cooper, Lord Justice General, vigorously declared—

> 'Once a person has been apprehended and committed for trial, the function of the press in commenting upon the guilt of the accused and the nature of the offence charged is, at least for the time being, at an end; and the public dissemination thereafter of insinuations or suggestions capable of prejudicing the public mind and the minds of prospective jurors with regard to a pending prosecution cannot be tolerated for it is in our view prejudicial to the interests of justice.'

These two Scottish judgments, it is submitted, go to the heart of the matter.

IV. THE POSITION IN NORTHERN IRELAND

When the Summary Jurisdiction Bill (Northern Ireland), 1953, was going through the Parliament of Northern Ireland, the Minister for Home Affairs claimed that a clause limiting pre-trial publicity was necessary in order, in such a small country, to obtain unprejudiced juries. The press, which regarded the proposal as the thin end of the wedge to secret trials, led a violent opposition.[67] The clause—'protean in its progress'—finally emerged in the statute as section 42.[68]

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[66] [1954] S.L.T. 14. And see Professor T. B. Smith's 'Note' in [1954] *Crim. L.R.* 506, and his recent Memoir of Lord Cooper. See also *Selected Papers, 1922–54* (1957) by Lord Cooper.

'SECTION 42'

By subsection (1) an opening statement, made on behalf of the prosecution at the preliminary hearing before the examining magistrates,[69] *must not be printed or published at all.*

Subsection (2) makes two further and drastic changes.

First, where, at the preliminary hearing, the admissibility of any evidence is challenged, the magistrate or justice who is presiding, if he is satisfied that the objection to the evidence is made in good faith, *may* order that the evidence and any discussion about it shall not be printed or published.

Secondly, whether any such objection has been taken or not, if that magistrate or justice thinks that publication of any part or parts of the evidence would prejudice the trial of the accused, he *may* make an order that such part or parts shall not be printed or published.

The penalty for contravention of subsection (1) or (2) may be imprisonment up to six months and/or a fine up to £500 (subsection (3)). But a prosecution requires the consent of the Attorney-General for Northern Ireland (subsection (4)).

Dr. John Edwards, who has lucidly analysed the case for and against pre-trial publicity, describes section 42 as

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[67] Dr. J. Ll. J. Edwards, 'Summary Jurisdiction Act (Northern Ireland), 1953' (1953) 16 M.L.R. 485. By the Republic of Eire, Criminal Justice Act, 1951, s. 20 (1), the District Court, when conducting a preliminary hearing, is authorised to adopt one of the following courses: (a) exclude the public, but not bona fide representatives of the press, from the court during the hearing; (b) prohibit the publication of information in relation to the proceedings; (c) impose restrictions on publication.

[68] Summary Jurisdiction Act (Northern Ireland), 1953. See *The United Kingdom* (1955), Vol. 1, G. W. Keeton and D. Lloyd (ed.) section entitled 'Northern Ireland,' by L. A. Sheridan, at pp. 415, 416, for the text of the section.

[69] Who are both legally qualified and possess at least six years' practising experience either as barristers or solicitors. See [1956] *Crim. L.R.* 305–8.

> 'a measure of reform long overdue in our own system of criminal justice.'[70]

In practice the section appears to have worked well.[71] Most of the Resident Magistrates (the equivalent of stipendiaries) appear to have welcomed the section and applied it to a wide variety of charges without unfavourable comment. It is right, however, to state that the Northern Irish Government has recently declared its intention of amending section 9 (2) of the Petty Sessions Act (Ireland), 1851—which corresponds to section 19 of the Indictable Offences Act, 1848 (now section 4 (2) of the Magistrates' Courts Act, 1952)—and of conferring an absolute right on the press to be present during preliminary proceedings. The new Jurisdiction Bill, however, has not yet been published.[72]

That section gives magistrates the power to exclude the press altogether from preliminary proceedings. If the defendant pleads guilty in the higher court, he can be sentenced without the public hearing the evidence against him. This is undesirable: the powers conferred by section 42 appear to be adequate. That section permits a magistrate to prevent publication *at the time,* but the Press retains the power to publish the evidence later, *i.e.,* when publication can no longer prejudice the trial.[73]

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[70] (1953) 16 M.L.R. 485; [1956] *Crim. L.R.* 152–5. Professor J. L. Montrose, Dean of the Faculty of Law in Queen's University of Belfast, and Dr. Edwards, Reader in Law at the same University, took a substantial part in the controversy leading to the passing of 'Clause 42' and I am greatly indebted to Dr. Edwards for his comments and some recent cuttings from Belfast editorials upon the subject, a note on the statistics, and for his kindness in lending me a copy of his Memorandum to the Tucker Committee. Upon his references I have liberally drawn.

[71] In an editorial, dated April 16, 1957, commenting on Devlin, J.'s observations in the *Adams* case, the *Belfast Telegraph*, 'the outstanding newspaper in the province' which led the Press campaign against the clause, thinks that 'in practice it has probably worked well enough.' The Minister for Home Affairs, in reply to a Parliamentary question, recently stated: 'Between February 18, 1953, and the present date a total of 3,701 cases have been returned for trial, and during the same period 137 applications were made under s. 42 of the S.J. Act, 1953, of which 113 were granted. On the 3,701 cases, 1,797 were returned for trial at the Recorders' Courts and courts of quarter sessions, 786 for trial at assizes and 1,118 for trial at the Belfast City Commission.'

[72] N.I. H.C. Deb., Vol. 40, No. 53, col. 2445.

'The provision has been invoked successfully in two recent cases of murder, *R.* v. *Gordon* (1953) and *R.* v. *Dodds* (1955), and in another case, *R.* v. *Finnegan* (1955) in which the original charge of murder was reduced to manslaughter. . . . the proceedings in camera (in *R.* v. *Gordon*) were confined to those parts of the evidence—involving an alleged admission and a full confession of the accused—the admissibility of which was contested by the defence.' From Dr. Edwards' *Memorandum to the Tucker Committee.*

V. CONCLUSIONS

To what conclusions does this survey point?

True it is that the origin of 'section 42' appears to have been to secure unprejudiced juries in a small country. Yet the strong words of Lord Hewart in 1924 did not suffice to prevent even an experienced reporter from reporting evidence before the magistrates as if it were given at the trial. Nor could the contempt proceedings after the *Adams* case and the vigorous warning of Lord Goddard suffice to deter a journalist from grossly prejudicing another trial for murder. An exceptional case, it may be argued. But there was the conspiracy trial at Newcastle, too. And where the life or liberty of a prisoner is in peril, can the plea of 'exceptional' hold? Should any prisoner be put in prejudice and should the public be put to the expense of beginning the trial afresh because a journalist forgets, or makes a mistake, or takes a chance, or, perhaps, does not know? Is the offence condoned when the editor who bona fide publishes a report, expresses his profound apology?

What then, is the solution?

Is it merely to hope that such incidents, after the condign warnings of successive Presidents of the Divisional Court during the last fifty years, will not recur? Is it the drastic procedure of the different criminal system in Scotland—to prohibit altogether reports of the preliminary proceedings? Or is it the 'section 42' procedure of Northern Ireland, suitably modified to suit English conditions?

LORD DENNING'S OPINION

Lord Denning has expressed the hope that, despite the 'cogent reasons,' this exception will not be extended to England. It is unlikely, he maintains, that a juror who has read a newspaper report of preliminary proceedings will remember sufficient to be influenced.

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[73] These comments are taken from the leader in the *Belfast Telegraph,* October 19, 1956.

> 'The importance of having all judicial proceedings in public outweighs, I think, all the suggested disadvantages.' [74]

Any word that falls from the lips of Lord Denning is entitled to the most profound consideration. Yet, does not the pre-trial publicity in the *Adams* case prove that the responsibilities of a free press *may* be abused? In a *cause célèbre,* where every detail of a pending trial is of national news value, are the reporters of the press really, or entirely—with the greatest respect—acting as 'the watchdogs of justice'? And, in such a case, is the jury stricken with 'entire forgetfulness'?

SIR PATRICK DEVLIN'S VIEW

Sir Patrick Devlin, speaking in November 1956, declared—

> 'It might be a wise precaution for the defence to ask that evidence, which is considered objectionable and which is given in the preliminary proceedings should not be published; and it is very likely that the press would comply. It is only in a few cases of exceptional public interest that a juryman is likely to read an account of the preliminary proceedings and it is doubtful if in any event he will read it with such attention as to carry away any very clear recollection of a particular part of the evidence?' [75]

These words were spoken before the trial of Dr. Adams before Devlin, J., and a jury in March and April 1957. Professor L. C. B. Gower has well pointed out that, apart from the weakness of the case for the prosecution, Dr. Adams owed his acquittal to a combination of three factors: '(1) the brilliant handling of the defence, (2) the masterly conduct of the trial by the learned judge, and (3) perhaps most of all the fortuitous preservation of the nurses' notebooks.'[76] After the Attorney-General's statement in the House of Commons, a former Home Secretary said that what worried most people was the question of trial by newspaper; he hoped the press would be very careful about a repetition.[77]

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[74] In *The Road to Justice* (1955), p. 67. See also a report of his Address to the National Association of Justices' Clerks' Assistants, *The Times,* May 27, 1957, re-emphasising that newspaper reporters are 'the watchdogs of justice.' See also, *op. cit.,* at p. 64. Sir Travers Humphreys was opposed to any alteration in the existing law (*The Daily Mail,* February 3, 1954). Thus also the General Council of the Bar (*Annual Statement* (1953), p. 15).

[75] *Trial by Jury,* Hamlyn Lectures (8th series, 1956), Stevens, pp. 45, 46.

DR. GLANVILLE WILLIAMS

In a strong *Note* written in 1951[78] after the *Armstrong* case,[79] Dr. Glanville Williams states—

> 'There are few points of law reform on which there is greater unanimity of opinion than that publicity of preliminary proceedings should be curtailed.'

It had been suggested that where the accused is committed there should be no report except the charge and the name of the accused—a proposal, says Dr. Williams, that had the support of Sir Tindal Atkinson and Sir Archibald Bodkin at the Departmental Committee on Coroners (1935) and of Dr. C. K. Allen in a letter to *The Times,* April 21, 1949.[80] Dr. Williams refers to the *Rutherford* trial of 1919 and the *Rouse* trial of 1931 when prejudice, he maintains, was caused by the present system.

> 'Let us agree, at any rate,' Dr. Williams urges, 'on turning the preliminary examination into a hearing in camera.'

NEED FOR REGULATION OF REPORTS

To turn the preliminary examination into a hearing in camera, it is submitted, would go too far, and would run counter to the English principle that all stages of a trial should be in public: nor would it appear to be either necessary or desirable. Yet all the evidence points to the need for a Preliminary Proceedings (Regulation of Reports) Bill. In 1926, after a *cause célèbre,* Parliament found it necessary to restrict the liberty of the press in their reports of matrimonial cases.[81] It is submitted that the pre-trial publicity in the *Adams* case and other cases calls for a similar intervention of the legislature. A subsequent *cause célèbre* might equally whet the national appetite and who knows whether the principal factors which in the *Adams* case so powerfully contributed to an acquittal would always be present?

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[76] (1957) 20 M.L.R. 390.

[77] *The Times,* May 2, 1957; May 1, 1957: *Parl. Deb., Official Report,* House of Commons, Vol. 569, cols. 292–334. In 1949, Mr. Chuter Ede, in answer to a Parliamentary question, said that if a case was not committed for trial after proceedings in camera, 'there might be insinuations which would be very harmful to the traditions of British justice': April 14, 1949: *Parl. Deb., Official Report,* House of Commons, Vol. 463, cols. 3023–4.

[78] (1952) 15 M.L.R. 98, 99.

[79] [1951] 2 All E.R. 219.

[80] See also Glanville Williams, *The Proof of Guilt,* Hamlyn Lectures (7th series, 1955), p. 229, and Lord Porter in *Journal of the Society of Public Teachers of Law* (1951), p. 463.

The 'section 42' procedure in Northern Ireland deserves—as it will no doubt receive—meticulous examination by the Tucker Committee.

NO PUBLICATION OF OPENING STATEMENT

In an important case of public interest, the jury is bound to have some preconceived notions based upon the opening statement made by the prosecution in the preliminary proceedings and upon the evidence which, in such a case, is normally reported with great particularity. The defendant normally reserving his defence, inevitably the report becomes one-sided. Is it not contrary to human nature to expect that each member of the jury—even after a strong and clear direction—will be able effectively and entirely to divest his mind or hers of every memory of that opening statement? That the opening statement before the magistrates should not be reported, seems obviously right.

RESTRICTION ON PUBLICATION OF EVIDENCE

To restrict the publication of evidence given before the magistrates, the admissibility of which is challenged and will inevitably be challenged at the trial—*e.g.,* of an alleged confession, would seem plain common sense. This, of course, would include any discussion upon its admissibility. If evidence is challenged, the challenge should be presumed to be given in good faith.

A provision to prohibit the publication of any part of the evidence—whether challenged or not—if the magistrate thinks that publication would prejudice or may reasonably be likely to prejudice, the trial, is no doubt to place a powerful discretion in the hands of an examining magistrate. But if the power is vested not in the president but in the whole bench, the bench may be trusted, after an address by the advocates on both sides, to examine it and to decide with good sense and discrimination.[82]

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[81] Judicial Proceedings (Regulation of Reports) Act, 1926, passed as the result of *Russell* v. *Russell* (1924) A.C. 687.

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[82] In Northern Ireland, it appears, an application by the defence for a restriction order has rarely been contested by the Crown.

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ENGLISH CRIMINAL LAW REFORM AND THE AMERICAN MODEL PENAL CODE

S. Prevezer

At the last meeting of the Society of Public Teachers of Law which was held in Belfast in September 1957, strong representations were made to the Lord Chancellor, the Rt. Hon. Viscount Kilmuir, urging the appointment of a special Criminal Law Reform Committee. The Lord Chancellor was sufficiently impressed by these representations to state that he was prepared to consider a memorandum from the Society, and assuming that this can persuade him and that the practical obstacles can be overcome, the Belfast meeting may yet prove something of a landmark in the history of English criminal law reform.[1] Certainly, despite those recent trends in criminal justice to which Dr. Webber referred last year,[2] a strong case exists for repairing much of the substance of our law of crime and for promoting the repair by the appointment of a special committee, particularly as the Law Reform Committee, like its predecessor the Law Revision Committee, has been so occupied with questions of civil law that no problem relating to criminal law has ever been referred to it. Apart from creating a new offence relating to dangerous driving,[3] such important criminal legislation as there has been in recent years has either consolidated existing law[4] or has dealt with a wide and controversial issue of social policy, to resolve which it was thought necessary to seek the guidance of a Royal Commission. Although, therefore, important changes have been effected in the law of murder,[5] and more may yet be expected in the law relating to prostitution, though probably not in that relating to homosexuality,[6] nothing has yet been done, nor can in the ordinary course of events be expected, to remove many of the defects of the criminal law which are of a more technical character and the effects of which are less likely to attract the attention of the general public. Yet these importantly affect the administration of criminal justice and deserve some priority for, as has been stated, 'If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.'[7]

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[1] See further *The Journal of the Society of Public Teachers of Law*, Vol. 4, No. 2 (December, 1957).

[2] Webber, 'Recent Trends in Criminal Justice' (1957), 10 *Current Legal Problems*.

[3] Road Traffic Act, 1956, s. 8 (1).

[4] *e.g.*, Licensing Act, 1953; Food and Drugs Act, 1955; and Sexual Offences Act, 1956.

[5] Homicide Act, 1957; see further the Report of the Royal Commission on Capital Punishment, Cmd. 8932 (1953).

It is sometimes objected in defence of our present law that the criticisms which have been particularly loudly voiced in recent years are misconceived since the results which the courts achieve in practice are for the most part satisfactory and the right people are generally acquitted and convicted. This complacent attitude, which is necessarily expressed in wide and sweeping terms, fails to take account of the extent of arbitrariness in the law which results in harsh and senseless convictions, and of its complexities, obscurities and loopholes which make for acquittal of the guilty and encourage the use of fictions and forced interpretations of legal concepts. These should not be tolerated but rectified by legislation, the wording of which should leave as little doubt as possible in the minds of judges and juries as to its intended application for, as a number of cases on the Homicide Act, 1957, have already shown, the most laudable legislative intentions may be frustrated in practice if they are inadequately expressed.

Thus, the introduction in section 2 of the Homicide Act of a partial defence of diminished responsibility was clearly intended

[6] See further the Report of the Committee on Homosexual Offences and Prostitution, Cmd. 247 (1957) and *e.g.*, the debate in the House of Lords, December 4, 1957: *Parl. Deb., Official Report,* H.L., Vol. 206, cols. 733 *et seq.*

[7] Wechsler, 'Challenge of a Model Penal Code,' 65 H.L.R. 1097, at p. 1098.

to mitigate the severity of the M'Naghten Rules and to legalise the evasion of them which had long been practised either irregularly or administratively by judges, juries and Home Secretaries.[8] Although the section was probably designed to cover cases of emotional instability outside the strict ambit of the Rules, its wording, unfortunately, is extremely vague,[9] and the Court of Criminal Appeal has held in effect in *R.* v. *Spriggs*[10] that the trial judge was entitled to allow the prosecution to submit that the section was restricted to persons of defective intelligence without ruling on the point and that it was sufficient for him to review the medical evidence and pass round copies of the section. 'It is not for judges,' said Lord Goddard, 'where Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, to re-define or to attempt to define the definition.'[11] Although the ultimate question, whether the accused's mental responsibility was substantially impaired by his abnormality of mind, is admittedly one of fact for the jury on whom Parliament clearly intended to confer a wide discretion, some guidance could surely have been given on the question of law relating to what states of mind were indicated by the phrase 'such abnormality of mind. . . .' Though judgment in *R.* v. *Spriggs* was given as recently as January 14, 1958, later cases have already confirmed the confusion which it has done nothing to dispel.[12]

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[8] See further Cmd. 8932, paras. 232–43.

[9] Section 2 (1) states, 'Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions. . . .'

[10] [1958] 1 All E.R. 300.

[11] *ibid.*, at p. 303. Yet as the editorial note to the All England Report points out, 'Although the terms of s. 2 (2) enact that "it shall be for the defence to prove . . ." the defence of diminished responsibility, it has been held that it is not sufficient merely to leave to the jury the terms of the section on that matter (see *R.* v. *Dunbar* [1957] 2 All E.R., at p. 739 . . .).'

[12] See, for example, *R.* v. *Bastian*, reported in *The Manchester Guardian*, January 30, 1958, and *R.* v. *Matheson*, reported in *The Manchester Guardian*, January 31, 1958. In the latter case, a fifty-one year old man whom the senior medical officer at Durham Prison described as a psychopath with a mental age less than that of a boy of ten was found guilty of capital murder and sentenced to death, it being said that his

Similarly, although one may fairly assume that section 1 of the Act, which abolished constructive malice, was meant to restrict the law of murder to cases where the accused foresaw, or at least should have foreseen, the likelihood of death, the Court of Criminal Appeal in *R.* v. *Vickers*[13] has recently interpreted 'grievous bodily harm' for the purposes of implied malice, which is preserved by the Act, as sufficient 'if it is such as seriously and grievously to interfere with the health or comfort of the victim.'[14] This phrase, which has been borrowed from judicial interpretations of 'grievous bodily harm' for the purposes of section 18 of the Offences against the Person Act or of earlier offences not involving death, is much wider than the description of grievous bodily harm for the purposes of implied malice which Mr. Justice Devlin accepted in 1949, 'at least terrible injury.'[15] The equation, for these purposes, of death and grievous bodily harm is only justifiable, it is submitted, if the latter is taken to mean such harm as the accused must or should have realised was likely to cause death. Whilst the definition in *R.* v. *Vickers* would not admittedly include a trifling injury or mere push (which in any event would probably have not been covered in practice by constructive malice),[16] it may well include many acts which involve no reasonable likelihood of death. Though Parliament has kicked constructive malice out of the front door, the Court of Criminal Appeal, by its wide interpretation of 'grievous bodily harm,' has gone some way towards readmitting it by the back door in the

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sexual perversion was not an abnormality of the mind but an abnormality of morals. Though the psychopathic offender presents one of the most difficult problems relating to section 2, it may be doubted whether the law of murder, and a fortiori the law of capital murder which is primarily designed to deter the professional criminal and protect the police, are the appropriate means of dealing with seriously retarded, psychopathic, sexual perverts.

[13] [1957] 2 All E.R. 741.

[14] *ibid.*, at p. 744, approving the direction of the trial judge.

[15] See *R.* v. *Thomas* [1949] 2 All E.R. 662 and (1952) 15 M.L.R. 345. The direction in *R.* v. *Vickers* is not new as regards implied malice: see *R.* v. *Bloom, The Times,* February 7, 1952. See further, Prevezer, 'The English Homicide Act, . . .' 57 *Columbia L.R.* 624, at p. 625; Turner, Malice Implied and Constructive [1958] *Crim. L.R.* 15–30.

[16] See further the views of Lord Goddard and the Director of Public Prosecutions as stated by the Royal Commission on Capital Punishment, Cmd. 8932 at para. 87. Note, too, the requirement of 'real violence' for the purposes of the resisting arrest rule, as defined in *R.* v. *Appleby* (1940) 28 Cr.App.R. 1.

guise of implied malice: constructive malice has been abolished because it was too harsh, yet there are few acts of violence in the course or furtherance of a felony involving violence or of resisting arrest which would in practice have given rise to constructive malice before 1957 which today could not be said 'seriously and grievously to interfere with the health or comfort of the victim.' Quite apart from the illogical reasoning underlying the provisions relating to capital murder, the Act is so poorly drafted that one can expect many more problems to arise in practice,[17] and it confirms the view that unless the objectives of legislation are plainly and unambiguously expressed, an invitation exists for the courts to frustrate the intention of Parliament.

It is, therefore, reassuring that the judiciary itself is today persuaded that clear statutory reform is needed in certain areas of the criminal law, and that Lord Goddard has recently spoken of the need to reform the law relating to larceny[18] and to indecent assault.[19] These are not the only areas in which this need should be apparent, though it would be difficult to examine them all in the space of one paper. Equally, it would hardly be worth while merely to criticise our existing law, without considering some possible alternatives. What can perhaps be achieved in a paper of this kind is the brief, and necessarily selective, examination of a few recent English cases raising problems of substantive criminal law, and of the recommendations which have been made with regard to those same problems by the American Law Institute, which is at present concerned with reform of the criminal law.

Comparatively little is known in this country of the work which the Institute has performed in various fields of law by its Restatements and in the field of criminal law by its Model Code of Criminal Procedure and its current Model Penal Code. The latter is specifically designed 'to serve as a reasoned integrated body of suggestions to assist any jurisdiction that undertakes a reform of its criminal law provisions.'[20] Although the Institute expects 'that substantial differences of social situation or of points of view . . . should be reflected in substantial variations'[21] in the various penal laws and the provisions of the Code have understandably been drafted primarily with a view to satisfying the needs of American state jurisdictions, this should not detract from their value for English purposes where the problems are common to both countries and no substantial differences of policy are involved. Indeed, a significant indication of the common nature of many of the problems, and of the general approach of the Institute, can be found in the fact that it has made good use of the services of one of the most distinguished of English academic criminal lawyers, Dr. Glanville Williams. The views of American judges and writers have already had considerable influence on our law, particularly in the field of torts, and it would be most unfortunate if we were too provincially-minded to recognise the benefits we can here derive in the field of criminal law.

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[17] See further, Prevezer, *loc. cit.*, n. 15, pp. 624–52.

[18] *Russell* v. *Smith* [1957] 3 W.L.R. 515 at 518.

[19] *Williams* v. *Gibbs*, *The Times*, December 12, 1957.

[20] Wechsler, 'The American Law Institute: Some Observations on its Model Penal Code,' *American Bar Association Journal* (April, 1956).

THE MACHINERY AND SCOPE OF THE MODEL PENAL CODE

It may be as well to appreciate at the outset of this paper, not merely the scope of the Model Penal Code, but the manner in which its drafting has been tackled, which should clearly show that it is not the product of a few well intentioned theorists working on narrow or impractical lines.[22]

Although a study of the defects of American criminal law was begun by the American Law Institute as early as 1923 and a proposal to prepare a Model Penal Code remained on the Institute's agenda of unfinished business for almost twenty years, it was not until 1952 that a grant from the Rockefeller Foundation enabled the undertaking to proceed in earnest. The machinery established by the Institute is highly impressive even if it may appear somewhat cumbersome. The Chief Reporter for the Code is Professor Herbert Wechsler of Columbia University, a former Assistant Attorney-General of the United States and today recognised as one of its leading criminal lawyers. The responsibility for reporting on certain topics has been entrusted to three specialist associate reporters, one of them being a former Chairman of the United States Board of Parole, and the reporters are assisted by a number of special consultants and research associates. The submissions of the reporters are first reviewed by a formidable advisory committee of the Institute which includes some of the most able federal judges in the country in the persons of Judges Learned Hand, Parker, Phillips and Goodrich, a number of experienced state judges and leading practitioners in criminal law, practical penologists such as the Director of the Federal Bureau of Prisons, and some of the foremost academic lawyers in the United States specialising in the fields of criminal law and criminology, including Professors Sheldon Glueck, Thorsten Sellin and Albert Harno. Furthermore, it is assisted by three recognised leaders in forensic psychiatry and by two of the draftsmen engaged on the recent important American experiments in criminal law codification, the Louisiana and Wisconsin Criminal Codes.

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[21] *ibid.*

[22] See further, Wechsler, *loc. cit.*, n. 7; *loc. cit.*, n. 20.

After the recommendations have been reviewed by this committee, a revised draft incorporating its accepted criticisms is submitted to the Council of the Institute which to a large extent represents a fresh array of talents though it does include some members of the advisory committee. Only after the provisions have again been sifted, are they then put to the Institute itself with its still wider basis of evaluation. A tentative vote is taken, and the material, with fresh amendments, may be reconsidered at a later meeting. Though this procedure appears to entail a questionable amount of duplicated effort, the principle of entrusting the primary tasks of codification to a group of qualified specialists and then subjecting their recommendations to the scrutiny of persons 'diversified in background, talent and experience' has much to commend it. No doubt, although if a Criminal Law Reform Committee were to be appointed in this country, its terms of reference would require a substantially different structure, it is to be hoped that it would primarily consist of judges, practising and academic lawyers, and yet allow for a wider representation of views which should find expression in the actual composition of the Committee and not merely in the evidence it would consider.[23]

Though it is difficult to make even a general assessment of the progress that has so far been achieved in drafting the Model Penal Code, the results indicate that the heavy expenditure of time, trouble and money has been well justified. The Institute has set itself an immense task and the work is proceeding fairly slowly, at least by American standards, the reason being, as the Chief Reporter has stated, 'that we spend almost half a year in presentation, in discussion and revision for every half a year devoted to producing new material.'[24] The first tentative draft, which was submitted to the members of the Institute in May, 1953, divided the Code into four Parts, Part I comprising the general provisions, Part II the specific crimes, Part III the principles and methods of treatment and correction, and Part IV the organisation of correction. Each Part consists of a number of articles, divided into sections, and when various articles from different Parts become ready for wider consideration, they are submitted in tentative drafts to the members of the Institute at its annual meetings in May. Each draft is supported by the comments of the Reporter and generally by at least one appendix summarising some of the current American, and sometimes English and foreign, law on the question in issue. At the 1957 meeting, the sixth and seventh drafts were submitted for discussion, and some of the subjects which have so far been considered are certain general principles of liability and responsibility, property offences, sexual offences, obscenity, perjury, the sentencing authority of the courts, suspended sentence, probation and parole, the sentencing and treatment of the young adult offender, the disposition of offenders and the organisation of correction. This list is not exhaustive and it hardly indicates the relative importance of the separate provisions, but it should give some idea of the breadth of research already undertaken. Some of the Institute's recommendations, such as those relating to territorial limitations of criminal jurisdiction, have little direct value for English purposes since they are immediately concerned with problems which spring from the federal system. Others, such as those relating to young adult offenders, raise important and controversial points of principle and are not likely to prove acceptable in this country, at least for some time to come. Nevertheless, most of the Institute's recommendations are interesting and provocative, and there are many areas of substantive law, only two of which are considered in this paper, concerning which the provisions of the Model Penal Code may prove helpful in resolving some of our own problems.

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[23] Note the suggestions of a number of academic lawyers at the Belfast meeting, *loc. cit.*, n. 1, at p. 85.

[24] Wechsler, *loc. cit.*, n. 20.

GENERAL PRINCIPLES

The recommendations relating to general principles of criminal liability are particularly worth considering, since in this country fundamental principles are rarely expressed in a statute, and the courts, adopting an inductive approach, tend to be concerned with specific problems as they occur in practice without examining more widely the principles and policies involved. In the area of criminal law, in which certainty and clarity are particularly necessary, the result has too often been obscurity and confusion.

(a) *Actus Reus*

A simple and current example can be found in the question of what acts may form the subject of criminal proceedings. Although the problems relating to the *actus reus* requirement are inherently more straightforward than those relating to the requirement of *mens rea,* the guilty mind which must accompany such acts, there is still considerable uncertainty as to what constitutes an act for the purposes of criminal law. It has been suggested that it is not any bodily movement but 'a muscular contraction that results from an operation of the will,'[25] and though special considerations clearly arise where the accused has been negligent at some earlier time, it is generally agreed in principle that when a person does something involuntarily, he should normally be exempt from criminal liability. 'Persons whose involuntary movements threaten harm to others may present a public health or safety problem, calling for therapy or even for custodial commitment; they do not present a problem of correction.'[26] Yet it is questionable whether this principle is adequately recognised and expressed in English criminal law. Certainly, where the involuntariness of the accused's conduct is due to physical compulsion and the offence charged involves a state of affairs rather than an act, the principle has been ignored in at least one notorious case, *R.* v. *Larsonneur,*[27] in which the defendant was ordered to leave the country, went to Ireland from which she was deported and handed over to the English police, and was then convicted of being an alien found in the United Kingdom without permission. Where it is alleged that the involuntariness is due to automatism, it is extremely uncertain which forms of automatism the law will accept as rendering an act involuntary, which will result in the accused's detention as insane and which in his complete acquittal, and whether automatism can be pleaded as a defence to all crimes. Some of the confusion on this last point is undoubtedly due to the uncertainty of our courts as to whether a person who acts involuntarily does not commit an act for the purposes of criminal law or whether he commits an act but without a guilty mind. As a strong Divisional Court found in *Hill* v. *Baxter*[28] in December 1957, the distinction may prove particularly troublesome where the offence charged is one of absolute prohibition and is thought to dispense entirely with the requirement of a guilty mind, and Lord Goddard's statement in *Hill* v. *Baxter,*[29] that there has been no case in either English or Scottish law in which the defence of automatism has been raised or been the subject of judicial discussion, coupled with certain other qualifying remarks, casts further doubt on its role in our criminal law. The statement itself may strike one as somewhat curious in view of the number of decided cases on the point cited by Dr. Glanville Williams[30] in 1953, of the still more recent decisions in *R.* v. *Charlson*[31] in 1955 and *R.* v. *Kemp*[32] in 1956, and of the acquittal of a man at the Central Criminal Court on October 24, 1957, of a charge of causing grievous bodily harm with intent after the jury had heard evidence that he was suffering from a condition 'which would cause him to act as an automaton and he would not know what he was doing.'[33] Most of these cases appear to have treated automatism as negativing a guilty mind in the form of a specific intention or of general foresight of consequences, and it is of course true that where a person has not been negligent and was fully unconscious of what he was doing, it can hardly be said that he intended, foresaw or should have foreseen the consequences of his conduct. But as Lord Goddard himself recognised in 1951 in *R.* v. *Harrison-Owen*,[34] and seems in *Hill* v. *Baxter* to have been prepared to recognise as true in certain cases,[35] automatism may be said to have the more fundamental effect of negativing the commission of an act for the purposes of criminal law. This is the view taken by Holmes and by Dr. Glanville Williams[36] and whilst it should dispose of the problem which arises where the offence charged is one of absolute prohibition, as in *Hill* v. *Baxter*, it may lead to a curious legal conclusion where the conduct of the accused is committed unconsciously because of a disease which renders him a constant menace to society. In one such case recently, *R.* v. *Kemp*,[37] Devlin, J., sensibly found the accused guilty but insane and ordered his detention under the Trial of Lunatics Act, 1883, though unfortunately this necessitated a somewhat unorthodox interpretation of the M'Naghten Rules,[38] and even, therefore, assuming that automatism negatives the commission of an act for the general purposes of liability, it may be necessary to find that the accused nevertheless committed an act for the purposes of the M'Naghten Rules and the Trial of Lunatics Act.

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[25] See further, Williams, *Criminal Law, The General Part* (1953), pp. 10–15.

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[26] Commentary to s. 201, Article I of Part I of the Model Penal Code, in Tentative Draft No. 4 at p. 119.

[27] (1933) 24 Cr.App.R. 74.

[28] [1958] 1 All E.R. 193.

[29] This statement is not to be found in the All England Report of the case, but see *e.g., The Times,* December 20, 1957.

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[30] Williams, *loc. cit.*, n. 25, pp. 10–15.

[31] [1955] 1 All E.R. 859.

[32] [1956] 3 All E.R. 249.

[33] *R.* v. *Martin*, *The Times*, October 25, 1957.

[34] [1951] 2 All E.R. 726.

[35] See [1958] 1 All E.R. 193 at 195.

[36] Williams, *loc. cit.*, n. 25, at p. 10.

[37] *loc. cit.*, n. 32.

[38] See further (1957) 20 M.L.R. 55–7; Griew, 'Diminished Responsibility and the Trial of Lunatics Act 1883,' [1957] *Crim. L.R.* 521–9; Prevezer, 'Fitness to Plead and the Criminal Lunatics Act 1800,' [1958] *Crim. L.R.* 144.

Though, obviously, they do not provide an answer to every problem which may arise relating to criminal conduct, the Model Penal Code's recommendations represent a considerable improvement on the English common law. Section 2.01 of Article 2 provides that 'A person is not guilty of an offence unless his liability is based on conduct which includes a voluntary act or the omission to perform an act which it was physically possible to perform,' and it attempts to clarify what constitutes an involuntary act, in what circumstances an omission can form the basis of liability, and when possession may be an act within the meaning of the section. It would preclude a conviction on facts such as those in *R.* v. *Larsonneur,* would deny liability for conduct committed by reflex actions or convulsions, during unconsciousness (which admittedly it does not define), or through hypnosis,[39] and it does not entail a clash with the insanity provisions of the Code. The distinction between negativing a guilty mind and negativing (the mental element in) an act is rightly irrelevant, and the provision clearly and logically applies to all offences, even those absolutely prohibited. Moreover, since liability is not stated to be based on a voluntary act or omission but on conduct which includes such an act or omission, it appropriately covers the case of the person, referred to by Pearson, J., in *Hill* v. *Baxter,* who, though actually unconscious when he performed certain conduct, should nevertheless be held liable for his prior negligence.[40]

(b) *Mens Rea*

Far more important is what the Model Penal Code has to say about the doctrine of *mens rea* and the defences which affect it, for few areas of English criminal law are more complicated and confused than that relating to the mental element in crime. The requirement of a guilty mind has, says Turner, 'for long past been firmly established as a cardinal feature of the criminal law,'[41] yet it is today still uncertain what the courts in practice will hold constitutes a guilty mind and when they will dispense with the requirement. Most academic lawyers appear to agree with Turner's view that there exists a general principle of *mens rea* entailing foresight of consequences by the accused, which may take the form either of an intention on his part that those consequences should occur or at least of recklessness as to the likelihood of their occurrence. At common law, it is thought, the principle is virtually unchallenged, though statutes may, in exceptional circumstances, impose liability for the mere voluntary commission of an act.

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[39] This is contrary to Dr. Glanville Williams' suggestion which, with respect, is not entirely convincing; see Williams, *loc. cit.*, n. 25, at p. 12.

[40] See further, *Kay* v. *Butterworth* (1945) 173 L.T. 191.

The cases show that the position is not as simple as this, even at common law. Though public nuisance[42] and, perhaps, criminal libel,[43] have usually been regarded as the only common law exceptions, an offence as important as contempt of court was in 1956 held by the Court of Criminal Appeal,[44] disregarding contrary authority,[45] to constitute a crime of absolute prohibition, and there are recent decisions, however debatable, to the effect that a common law conspiracy to commit an offence of absolute prohibition is itself an offence of absolute prohibition.[46] Clearly, one cannot be certain that the list of common law offences of absolute prohibition is closed.[47]

Far more disturbing is the number of statutory offences which have been construed by the courts as imposing an absolute prohibition. Here the fault lies more with the judges, some of whom have been notoriously uneven in their interpretation of criminal statutes, than with the statutory draftsmen whose unsystematic choice of legal terms has undoubtedly encouraged judicial inconsistency. The recent critical examination by Dr. Edwards[48] has exposed quite clearly the remarkable disparity of interpretation of such terms as 'maliciously,' 'wilfully,' 'suffering,' 'permitting' and 'fraudulently,' which are haphazardly employed in criminal statutes, and a body of case law has been built up about these and other terms which has become increasingly difficult to comprehend. Refined distinctions, which one can fairly assume were never envisaged by Parliament, have frequently obscured the policies which the statutes were presumably designed to express, and have even resulted in an unfortunate and basic confusion of strict and vicarious responsibility.[49] Although it is true that a number of sensible declarations of principle have stemmed from the Lord Chief Justice in recent years,[50] considerable inroads have been made on the traditional basis of criminal liability, many of them by courts over which Lord Goddard has himself presided.[51]

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[41] Kenny's *Outlines of Criminal Law* (16th ed. 1952), at p. 20.

[42] *R.* v. *Stephens* (1866) L.R. 1 Q.B. 702; but see *R.* v. *Vantandillo* (1815) 4 M. & S. 73.

[43] See further, Cross and Jones, *Introduction to Criminal Law* (3rd ed. 1953), at pp. 49–50.

[44] *R.* v. *Odhams Press Ltd. and Others ex p. Att.-Gen.* [1956] 3 W.L.R. 796.

[45] See further (1957) 20 M.L.R. 275–8.

[46] *R.* v. *Clayton* (1943) 33 Cr.App.R. 113 and *R.* v. *Sorsky* [1944] 2 All E.R. 333. Contrast, as regards a common law attempt to commit an offence of absolute prohibition, *Gardner* v. *Akeroyd* [1952] 2 All E.R. 306, and see further (1953) 16 M.L.R. 236 at p. 238.

[47] Note, for example, the uncertainty in practice surrounding the offence of publishing an obscenity, and the discussion in St. John-Stevas, *Obscenity and the Law* (1956).

What is fundamentally disquieting about this process is the virtual absence of any legislative or judicial evaluation of the necessity or justice of absolute prohibition. There are, obviously, areas of the criminal law in which it is necessary to ensure that persons act with extreme care and in which it would be very difficult for the prosecution to establish the presence of foresight of consequences with the aid of existing presumptions and rules of evidence. On the other hand, is it necessary or just to impose liability in cases where the accused has taken every conceivable precaution or at least acted reasonably in the circumstances?[52] The Model Penal Code suggests that the solution lies in the introduction of a new category of offence which is primarily pun-

[48] *'Mens Rea' in Statutory Offences* (1955).

[49] See further, Williams, *loc. cit.*, n. 25, at pp. 285–7, and 9 *Current Legal Problems* (1956), at pp. 57–74.

[50] The most celebrated of these are contained in *Brend* v. *Wood* (1946) 175 L.T. 306; *Harding* v. *Price* [1948] 1 K.B. 695; *Younghusband* v. *Luftig* [1949] 2 K.B. 354.

[51] See *e.g.*, the decisions in *Gott* v. *Measures* [1948] 1 K.B. 234; *Kat* v. *Diment* [1951] 1 K.B. 34; *Browning* v. *Watson* [1953] 1 W.L.R. 1172; *Shave* v. *Rosner* [1954] 2 W.L.R. 1057.

[52] This argument has been more fully and forcibly presented by other writers in recent years. See *e.g.*, Edwards, *loc. cit.*, n. 48; Williams, *loc. cit.*, n. 49.

ishable by a fine and is clearly administrative and non-criminal in nature.[53] A more just solution, perhaps, lies in the adoption of a criterion of negligence which has rarely been employed in criminal law with a definite object in view; moreover, the substitution of negligence for strict responsibility can be made workable by transferring the onus of proof to the accused.[54]

The unwitting equation of negligence and *mens rea* which is all too frequently found in our criminal law is perhaps the clearest indication of the confusion which surrounds the meaning of a guilty mind. Although manslaughter has usually been regarded as the sole *important* exception to the general rule that the accused must at least have actually foreseen the consequences of his conduct, the Court of Criminal Appeal decided in *R.* v. *Ward*[55] in 1956 that negligence constitutes a form of malice aforethought and that murder can be committed despite the lack of foresight by the accused that certain consequences were likely to ensue from his conduct. A year later, after the passage of the Homicide Act, the same court held in *R.* v. *Vickers*[56] that 'If a person does an act on another which amounts to the infliction of grievous bodily harm, he cannot say that he did not intend to go so far. It is put as *malum in se* in the old cases and he must take the consequences.'[57] This decision, which goes further than that in *R.* v. *Ward,* undoubtedly obscures the dividing line between many cases of murder and manslaughter, one result of which is that it will too often depend on judicial or administrative discretion whether the accused should be convicted of the latter offence and perhaps escape punishment entirely, or whether he should be convicted of the former offence and necessarily be sentenced to life imprisonment or, in some illogically defined cases, to be hanged. Nor are murder and manslaughter the only offences with regard to which the courts have equated negligence and foresight and confused the functions of law and evidence by requiring the accused's mistake to have been reasonable as well as honest.[58] Moreover, by failing to recognise that the material elements of an offence, with regard to which the prosecution must prove a certain state of mind, should include 'the facts that negative defences on the merits as well as the facts included in the definition of the crime,'[59] English courts today are particularly likely to admit negligence as a basis of criminal liability. Whilst it is sometimes,[60] though still too infrequently, conceded that if a defence involves a denial of foresight of consequences, there should generally be no requirement that the accused's mistake was reasonable provided it was honest, where the mistake does not involve a denial of foresight it is probable that the accused will be liable unless his mistake was both honest and reasonable. Thus in *R.* v. *Strang*[61] the accused, who fired at a police officer whom he honestly though drunkenly believed to be a burglar threatening the life of his mistress, was convicted of unlawful wounding and informed that the sentence of eighteen month's imprisonment would have been substantially greater had the judge not believed that his mind was bemused by drink at the time in question. Similarly, can one doubt, for example, what result would probably be reached in practice if a person having committed serious acts in the grossly unreasonable though admittedly honest belief that his life would be taken by another unless he acted in that way, attempted to rely on a defence of a mistaken belief in duress? It may be that the courts in practice act on a general principle, applicable to all offences, that if a person foresees the consequences of his future conduct but nevertheless persists in carrying it out, he should be required to prove *inter alia* that he was at least acting reasonably in the circumstances. The merits, indeed, the existence, of such a principle have never been confirmed, and confusion is bound to arise unless the courts distinguish clearly beween the material elements of an offence and expressly recognise, if necessary, that while intention or recklessness are required in relation to certain elements, perhaps a lesser degree of culpability in the form of negligence should suffice in relation to others.

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[53] See Part I, Article I, s. 1.04.

[54] See further, Edwards, *loc. cit.*, n. 48.

[55] [1956] 1 Q.B. 351, criticised in Prevezer, 'Murder by Mistake' [1956] *Crim. L.R.* 375–83.

[56] *loc. cit.*, n. 13.

[57] *ibid.*, at p. 743.

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[58] Many of these are considered by Edwards, *loc. cit.*, n. 48, pp. 190–216.

[59] Note the commentary to s. 2.02 of Part I, Article I in Tentative Draft No. 4 at p. 123.

[60] See particularly the decision of Lord Goddard in *Wilson* v. *Inyang* [1951] 2 K.B. 799 explaining his statement in *Younghusband* v. *Luftig* [1949] 2 K.B. 354 that the accused 'must, of course, have a reasonable ground for his belief.'

[61] See *The Daily Telegraph*, December 25, 1954.

Substantially the same problems relating to *mens rea* exist in the United States. There, too, there has been a vast growth of strict liability though, as in this country, 'why the mere fact of public welfare purposes . . . should support the disregard of the first principles of justice is not explained in any of the books or the opinions of the courts.'[62] There, probably to an even greater extent than in England, one finds what the late Mr. Justice Jackson called 'the variety, disparity and confusion' of judicial definitions 'of the requisite but elusive mental element,'[63] and even when it is recognised that a guilty mind is required, 'it is difficult to trace a stable principle in the determinations of prevailing law as to when criminality is made to rest on negligence and when on knowledge and purpose.'[64] Since to a large extent, the answer rests with the judges and not with the draftsmen, the Model Penal Code does not resolve the problem but it does radically reduce its dimensions by stating certain rules which are more specific and helpful than any which have been formulated in this country. Moreover, the proposal to relegate offences of absolute prohibition to an administrative and non-criminal category offers an escape from some of the injustice inherent in the current approach in both countries. Whether the expediency of this proposal outweighs the greater fairness of basing liability on negligence in certain restricted areas of criminal law is difficult to say; in any event either solution is preferable, it is submitted, to the present imposition of strict liability carrying all the consequences of a crime.

With regard to what is meant by a guilty mind, section 2.02 of Article 2 acknowledges four different kinds of culpability, namely purpose, knowledge, recklessness and negligence, although the first and last are treated as exceptional. These kinds of culpability apply to all the material elements which may vary in

[62] Wechsler, *loc. cit.*, n. 20.
[63] *Morissette* v. *United States*, 342 U.S. 246 (1951), at 252.
[64] Wechsler, *loc. cit.*, n. 7, at p. 1109.

that they may involve (1) the nature of the forbidden conduct or (2) the attendant circumstances or (3) the result of conduct, and section 1.14 elaborates the meaning of a material element in the manner already indicated. With regard to each material element, the Code implies that, wherever possible, legislation shall expressly provide for liability in terms of one of the four kinds of culpability, which it carefully defines, but where 'the culpability sufficient to establish a material element of an offence is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto,'[65] thus preserving the traditional common law basis of liability that the accused should at least have foreseen the consequences of his conduct. Unless the definition of the offence distinguishes between its material elements, the prescribed culpability requirement applies to all of them, though ultimately only judicial interpretation can determine which elements are material. Some idea of the precision with which section 2.02 defines the four kinds of culpability can be gathered from two of the subsidiary provisions, that the requirement of purpose is satisfied if the purpose is conditional, and that the requirement of knowledge is satisfied by knowledge of substantial probability.[66] The former resolves a problem which English courts have usually ignored in practice, and which may, for example, arise in the question whether a person can be said to intend permanently to deprive if he takes another's goods without his permission, intending to replace but knowing that there is no reasonable likelihood of him being in a position to do so.[67] The latter deals with the troublesome problem of 'wilful blindness' or 'connivance' and, as is claimed, 'solidifies the usual result and clarifies the terms in which the issue is submitted to the jury.' Far too often in reading reports of English cases, one is left in doubt whether the decision turned on wilful blindness or on simple negligence, because the judge's direction failed to point out the radical difference between the two.[68]

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[65] Para. 3 of s. 2.02.

[66] Paras. 6 and 7 respectively of s. 2.02.

[67] Note for example the confusion apparent in *R.* v. *Williams* [1953] 1 All E.R. 1068.

[68] A good example can be found in *Carter* v. *Mace* [1949] 2 All E.R. 714; see now *Davies, Turner & Co., Ltd.* v. *Brodie* [1954] 3 All E.R. 283.

(c) *Causation*

Another aspect of the general principles of criminal liability with regard to which the Model Penal Code makes certain valuable suggestions is causation. This only arises as a problem where the *actus reus* of an offence consists not of an act but of a particular result created by an act, and most of the cases, which concern homicide are dealt with in both countries on the basis that only causes which are proximate to the result are punishable. In effect, what amounts to proximity may depend on archaic notions of causation, though if the judge considers that the accused ought morally not to be convicted, he may well avoid a strict application of the law by taking a lenient view of the facts. Thus in *R.* v. *Horsey*,[69] where the accused, on discovering the presence of his victim, earnestly tried to save his life, Baron Bramwell charitably directed the jury that it might find that the death was not caused by the act of the accused but by his victim going on to the haystack after it was feloniously set alight. Where the law is allowed its strict application, its harshness may undoubtedly result in unjust convictions,[70] and until the recent decision in *R.* v. *Jordan*,[71] which accepted that serious negligence intervening between the act and the death might break the causation, it was quite likely, particularly because of the doctrine of constructive manslaughter, that a person could be convicted of manslaughter even though he intended to inflict comparatively minor injury on his victim, who subsequently died as a result of negligent medical treatment. Similarly, even serious contributory negligence by the victim may still be discounted unless it is so extreme that death would have resulted without any negligence on the part of the accused.[72] Where death is apparently the result of a double event, in respect of which the accused is an independent and perhaps minor participant, the Court of Criminal Appeal has recently declined to resolve the problem, stating in *R.* v. *Innes*[73] that 'What the exact direction to the court should have been raised a difficult question but it was not desirable that the court should answer it because there was in fact no direction on the matter and therefore the conviction would be quashed.' Similarly, though it is sometimes suggested that intended consequences can never be too remote in criminal law, it is difficult to believe that some limitation should not be placed on this principle, applicable, for example, to cases where the accused merely tenders advice and the deceased, appreciating its possible consequences, acts on it without constraint.[74]

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[69] (1862) 3 F. & F. 287.

[70] See generally Williams, 'Causation in Homicide' [1957] *Crim. L.R.* 429–40, 510–21.

[71] [1956] *Crim. L.R.* 700.

[72] *R.* v. *Dalloway* (1847) 2 Cox 273.

[73] *The Times*, October 27, 1953.

Section 2.03 of the Model Penal Code 'undertakes a fresh approach to what appears to be the central issues.' Paragraph 1 (a) treats 'but-for' causation (or 'factual' causation, as Dr. Glanville Williams calls it),[75] as normally sufficient, but paragraphs 2 and 3 recognise the fact that 'When concepts of "proximate causation" disassociate the actor's conduct and a result of which was a but-for cause, the reason always inheres in the judgment that the actor's culpability with reference to the result, *i.e.*, his purpose, knowledge, recklessness or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offence of which he is convicted. Since this is so, the draft proceeds on the view that problems of this kind ought to be faced as problems of the culpability required for conviction and not as problems of 'causation.'[76] This, with respect, is an eminently sensible approach, and the commentary to section 2.03, which is too detailed to be reproduced here, presents an extremely convincing argument in favour of basing liability generally, in effect, on foresight or, where the offence may be committed by negligence, on negligence. Constructive manslaughter drops out of the picture, and provision is made for allowing liability where the result contemplated (or, where the offence may be committed by negligence, where the probable result) would have been more serious or more extensive than that caused or where a different person or different property is injured or affected. The limitation in respect of obviously remote, though nevertheless intended or probable, consequences is 'put squarely to the jury's sense of justice'[77] by alternative recommendations, one of which permits it to acquit if it feels that the result 'is too accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offence.'[78] Though this inevitably confers a discretion which is open to abuse, 'it does not attempt to force a result which the jury may resist' and rightly 'leaves the principle flexible for application to the infinite variety of cases likely to arise.'[79]

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[74] See further Williams, *loc. cit.*, n. 70.

[75] *ibid.*

[76] Commentary to s. 2.03 of Part I, Article I in Tentative Draft No. 4, at p. 132.

The number of problems relating to general principles which the Code answers, or at least clarifies, are too numerous to be considered here. The provisions which have already been referred to, however briefly, should indicate something of the possible value of important though more controversial sections relating to such problems as insanity and liability for the conduct of another which may help to simplify the task of any Criminal Law Reform Committee in this country. Some of the general provisions of the Code, such as those relating to compulsion and duress, have yet to be drafted and may of course prove to be of doubtful value, but the work of Dr. Glanville Williams on general principles of justification, which has not yet been submitted to the Institute but some of which the present writer has been fortunate enough to see, should undoubtedly prove of great assistance in resolving many problems of importance, regarding which our criminal law is in a confused and unsatisfactory state.

THEFT

Perhaps the most valuable provisions of the Code for the English lawyer are those relating to certain property offences. It is generally recognised, by judges, practitioners and teachers alike, that no part of our criminal law is so clearly defective and riddled with technicalities as that relating to larceny and kindred offences. As Lord Goddard recently stated, citing with approval a note in the *Law Quarterly Review*[80] calling for reform of the law of stealing, 'it would be a good thing . . . if the law of larceny could be somewhat simplified and cleared up.'[81] A recent judgment has prompted one writer to state that 'For centuries the law of larceny has been the source of a struggle between the principle of legality . . . on the one hand, and on the other, the natural desire of the judges that a man who has acted in a patently dishonest manner should not escape punishment.'[82] Inevitably, the judges have sometimes lost the struggle but when they have won, they have too often necessarily had to resort to makeshift fictions, grossly artificial distinctions and obviously erroneous reasoning. This has resulted, as any competent student can attest, in deplorable confusion surrounding the meaning of many of the fundamental requirements of larceny, and the recent Divisional Court decision in *Moynes* v. *Coopper*[83] indicates that unless something is done by the legislature, the confusion is likely to become much worse. Moreover, the different policies which are presumably meant to distinguish many of the offences in this field are often difficult to perceive and impossible to justify. The distinction between larceny by a trick and obtaining by false pretences, which because of the Homicide Act, 1957, may even mean the difference between life and death for an accused person,[84] is an obvious example. Others, less ominous perhaps though similarly confusing, can be found in larceny by a bailee and fraudulent conversion, fraudulent conversion and embezzlement, obtaining by false pretences and obtaining credit by fraud, robbery, larceny by intimidation and the different forms of 'blackmail.' No one can explain and justify by other than historical reasons, the peculiar wording and implications of many of these offences which, for example, in the case of 'blackmail' resulted in the acquittal of Mrs. Bernhard[85] and the conviction of Miss Dymond[86] on substantially similar facts. Why should a bona fide claim of right be a defence when the demand is made orally but not when it is made in writing? As the actual proceedings in another recent case, *R.* v. *Moran*,[87] indicated, the fact that several distinct offences, such as 'blackmail' in one form or other, robbery (and even larceny by intimidation) may all appear relevant to the same set of facts is bound to cause confusion and increase the chances of a wrongful acquittal. Although no recommendations have yet been made with regard to burglary and housebreaking by the American Law Institute, one may still question what purpose underlies the peculiar wording of sections 25, 26 and 27 of the Larceny Act, 1916. Indeed does any logical need exist for the preservation of these offences which depend upon an intent to commit another felony and can perhaps be regarded as an aggravated form of that felony or an attempt to commit it, usually accompanied by malicious damage to property? Moreover, should one property offence be a felony and another a misdemeanour when the character and repercussions of the latter may in fact be far the more serious? Though the question of grading and punishment is obviously one of general application requiring serious reconsideration, it is especially relevant to the property offences where the distinction between certain felonies and misdemeanours is often particularly difficult to discern.

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[77] *ibid.*, at p. 135.
[78] See paras. 2 (b) and 3 (b).
[79] Commentary, *loc. cit.*, n. 76.
[80] (1956) 72 L.Q.R. 183.

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[81] *Russell* v. *Smith, loc. cit.*, n. 18.

[82] Smith, 'Larceny by Finding Out' [1956] *Crim. L.R.* 516.

[83] [1956] 1 All E.R. 450. See, similarly, *McGregor* v. *Benyon* [1957] *Crim. L.R.* 608.

[84] See s. 5 (1) (*a*) and s. 5 (5) (*e*).

[85] *R.* v. *Bernhard* [1938] 2 K.B. 264.

[86] *R.* v. *Dymond* [1920] 2 K.B. 260.

Recognising that the common unifying conception in such offences as larceny, obtaining by false pretences, robbery and 'blackmail' is the involuntary transfer of property without consent or with consent obtained by fraud or coercion, the Model Penal Code consolidates these and other closely related but traditionally distinct offences such as embezzlement, fraudulent conversion and receiving into a single offence of theft. Nevertheless, it articulates 'a properly specific delineation of the various types of criminal property deprivations,'[88] grades them according to severity 'rather than according to a technical classification whose significance is chiefly historical,'[89] and brings into play the general punishment provisions of the Code. The unification of the different offences 'facilitates the drafting of provisions dealing with defences applicable to all forms of theft,'[90] thereby avoiding the *Bernhard-Dymond* type of situation, and the commentary to Article 206 of Part II states that one of the purposes of the consolidation 'is to prevent procedural difficulties resulting from the fact that the boundaries between the traditional offences are obscure and from the rule that a defendant charged with one offence cannot be convicted by proving another.'[91] To some extent, of course, this latter difficulty is already met in England by section 44 of the Larceny Act, 1916, and the Code's provisions relating to theft are more interesting and valuable to the English lawyer for their delineation of the various types of theft which involve important extensions of our present law and the rejection of particular requirements which have proved a fertile source of confusion of the courts and of acquittal of obviously dishonest persons. One of the most important of these is the English requirement that the *animus furandi* in larceny must exist at the time of taking possession which lies at the root of some of the confusion. Whilst one may favour the person who innocently receives goods and only subsequently succumbs to temptation to the person who has a dishonest intention from the outset, this need not result in the complete acquittal of the former of any criminal offence. This view is already recognised in this country by judicial attempts to circumvent the requirement and by the legislative creation of the offences of embezzlement, fraudulent conversion and larceny by a bailee, but these offences are extremely limited in scope. The Code dispenses with the requirement and this, it is submitted, is eminently sensible: the fact that a person's original intention was honest should merely be a factor in favour of mitigating his punishment and not a reason for his complete exemption from criminal liability. ✓

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[87] [1952] 1 All E.R. 803; see further (1952) 15 M.L.R. 345.

[88] See Appendix A to the Commentary to Article 206 of Part II in Tentative Draft No. 1, at p. 106.

[89] See the Introductory Note to Article 206 of Part II in Tentative Draft No. 2, at p. 58.

Obviously, in view of the number and complexity of the offences assimilated, one can only briefly summarise the theft provisions of the Code. These state, *inter alia,* that theft may be committed by an unauthorised taking or disposition,[92] by deception,[93] by intimidation,[94] by the failure to make required disposition of funds received[95] or, in certain circumstances, to return lost property or property delivered or transferred by mistake,[96] by temporary deprivation or use of property,[97] by dishonest obtaining of labour or services,[98] or by receiving.[99] Even this list should indicate certain logical extensions of our existing law. By speaking primarily in terms of property and not of interests in property such as possession and ownership, the Code discards our senseless and confusing distinction between larceny and obtaining by false pretences, and the definitions of deception and intimidation preserve the merits of our existing law whilst closing some of its loopholes. The fact that immovable property may be the subject of theft by a person with the power to transfer or encumber it and that a person may be guilty of theft without an intention of permanent benefit and if he exercises only temporary control over another's property, seems justifiable in the circumstances carefully enumerated by the Code. The provision relating to theft of labour or services, which is substantially an innovation in Anglo-American law, appears particularly sensible in view of the obvious inadequacy of the law, as does the assimilation of receiving with its special provision relating to a dealer in stolen property, which effectively disposes of a particularly troublesome problem often arising in English courts, namely how far the police may go to protect the rightful owner without losing their hold over a would-be receiver.[1] In addition, the Code contains a number of provisions relating to the general scope of theft, concerning, for example, bona fide claim of right,[2] joint ownership[3] and theft by spouses,[4] which clarify and slightly extend our present law, and certain subsidiary offences are created, related to, but outside the scope of, theft, concerning, for example, fraudulent practices,[5] securing employment by fraud,[6] bad cheques,[7] deceptive business practices,[8] non-fraudulent misapplication of property[9] and property destruction.[10] A general provision recognises the consolidation of the various theft offences, and, subject to the power of the court to ensure a fair trial, permits conviction for one theft offence on evidence that the accused committed any other form of theft.[11]

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[90] *ibid.*

[91] *loc. cit.*, n. 88, at p. 107.

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[92] s. 206.1.

[93] s. 206.2.

[94] s. 206.3.

[95] s. 206.4.

[96] s. 206.5.

[97] s. 206.6.

[98] s. 206.7.

[99] s. 206.8.

[1] See *e.g.*, cases like *R.* v. *Villensky* [1892] 2 Q.B. 597; *R.* v. *King* [1938] 2 All E.R. 662. The possibility under the present law of a conviction for attempted receiving seems somewhat remote, though 'it is impossible to speak with certainty.'

[2] s. 206.10.

CONCLUSION

This very brief consideration of only a few of the provisions of the Model Penal Code and their possible application to problems arising in the English courts should give some indication of its potential value to an English Criminal Law Reform Committee. Unfortunately, it has been impossible to examine even these provisions in any detail, and no doubt closer inspection may reveal defects which render some of them unsuitable for English purposes. Many of the other provisions are obviously highly debatable and there may be radical policy differences which would prevent their adoption in this country. But at least they are the work of qualified specialists in this field of law undertaking a task which should long ago have been undertaken here, and it is to be hoped that when eventually something is done about reforming our criminal law, careful consideration will be given to their recommendations which may resolve at least some of our current legal problems.

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[3] s. 206.11.
[4] s. 206.13.
[5] s. 206.20.
[6] s. 206.21.
[7] s. 206.22.
[8] s. 206.24.
[9] s. 206.40.
[10] s. 206.50.
[11] s. 206.60.

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ADMINISTRATIVE TRIBUNALS AND THE FRANKS REPORT

George W. Keeton

In considering the Franks Report on Administrative Tribunals and Enquiries, which appeared in July, 1957,[1] some comparisons and contrasts with the conclusions of similar enquiries almost inevitably arise. The first is the contrast between the treatment of administrative tribunals by this committee and that of the Donoughmore Committee which reported exactly a quarter of a century ago.[2] The contrast emphasises the distance we have travelled towards the replacement of law by administration in that space of time, even though the Franks Committee is concerned only with tribunals, which was the subject of the second part only of the terms of reference of the Donoughmore Committee. The first part of their terms of reference included delegated legislation. Another comparison which occurs readily to the mind is with the investigation and conclusions of the Attorney General's Committee on Administrative Procedure in the United States. The work of this committee, set up in 1939, was the foundation on which, after a good deal of modification of various draft bills, the Federal Administrative Procedure Act, 1946, was built.[3] There are, of course, fundamental differences between the conditions in which the problem of administrative jurisdiction exists in the United States, and the conditions in which it has developed here. Of these, the most important is the existence of the American Constitution, within which all American administrative agencies must operate. Although there are also some important similarities, due primarily to the common origin of the English and American legal systems, the working out of the theory of separation of powers in the American Constitution has made it impossible for the American administrative agencies to avoid, in general, judicial review of the judicial and quasi-judicial decisions of administrative tribunals, whilst the Federal Administrative Procedure Act, 1946, made a bold attempt to improve the procedure of administrative tribunals themselves by prescribing certain minimum standards of procedure, which were of general application. Thus, Professor Schwarz in the concluding paragraph of his work upon *American Administrative Law* observes:[4]

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[1] Cmnd. 218 (1957).

[2] Cmd. 4060 (1932).

[3] See further, *The Federal Administrative Procedure and the Administrative Agencies* (ed. G. Warren), The New York University School of Law (1947).

> 'The role of the State has expanded as much in America in the past century as it has in this country, and it has been accompanied by as great an expansion of governmental power. It is significant, however, that this new development—the growth of administrative law—has proceeded along different lines in America from those it has followed here. The tendency in America has been towards the *judicialisation* of these new forces of social control—towards fitting them into the existing constitutional framework, and above all towards their subordination to law.'

Unhappily, the English experience in the past quarter of a century has been very different.

DEVELOPMENTS SINCE THE DONOUGHMORE COMMITTEE

Inevitably in considering the Franks Report, the mind returns to the work done by the Donoughmore Committee in 1932. The terms of reference of that committee, it has been pointed out, were wider than those of the Franks Committee, and there has been some tendency since 1932 to concentrate criticism upon that part of the Report which considered delegations of legislative power. This was in part due to the fact that the discussion which had been conducted in books and periodicals in the years immediately prior to 1932 had emphasised the threat to Parliamentary sovereignty which was implicit in the remarkable growth of delegated legislation which had occurred. It may also have been due to the fact that in 1932 there had not yet taken place the very considerable extensions of departmental jurisdiction which, first the depression, later the war of 1939–45, and finally, the social revolution which occurred between 1945 and 1951, brought into existence. In 1932 rent tribunals were happily unthought-of, and even procedure by public enquiry had not yet assumed the importance which it has done in post-war social reconstruction, and, in particular, in the building of the new towns. Underlying the recommendations of the Donoughmore Committee are certain basic assumptions, the existence of which, it was thought, would allay anxieties, and which led necessarily to the conclusion, which the past quarter of a century has falsified, that the dangers had been greatly exaggerated. In reality, the actual conclusion which ought to have been drawn in 1932 should have been a different one. It was that, whilst at that date there may have been few cases of serious oppression or injustice arising from progressive extensions of departmental power, the haphazard method of delegation adopted, coupled with the manifest determination of departments to remove disputes between the individual and authority from the jurisdiction of the ordinary courts contained within them dangerous potentialities which could be, and were, exploited to the detriment of private rights in a period of rapid social change. It is therefore not at all surprising that episodes such as that which was exhaustively examined in the Crichel Down enquiry should have occurred, or that organs of government, both central and local, should have been increasingly bold in their use of powers conferred by Act of Parliament to achieve ends not foreseen at the time when power was delegated. Instances of this occur so frequently today that they only occasionally evoke comment. A recent illustration may suffice to illustrate the point:

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[4] (1950), p. 128.

In *Grice and Another* v. *Dudley Corporation,*[5] the corporation in 1937 made a compulsory purchase order under the Public Works Facilities Act, 1930, authorising them to purchase some property for road widening and for erecting a market hall. At that time the property was owned by a person whose executors were the plaintiffs in this action. The order was confirmed by the Minister, and the corporation served a notice to treat on the owner in January, 1939, and in July, 1939, the corporation and the owner agreed that the compensation price payable should be £5,700, with a further £300 for fixtures. Owing to the outbreak of war, the matter went into abeyance, and the landowner died in 1942. In the interval between his death and the action, the executors raised the matter several times with the corporation, who declined to proceed further. However, between 1951 and 1954 the corporation decided to go ahead with various schemes of improvement which differed substantially from those comprised in the 1937 order, and in August, 1954, the corporation announced that it was now prepared to buy the land at the price agreed on in 1939. When the executors objected, the corporation declared that it would pay the compensation money into court, and would execute a deed vesting the property in themselves, under powers conferred by sections 76 and 77 of the Lands Clauses (Consolidation) Act, 1845. Upjohn, J., held that where in these circumstances a local authority showed an intention of abandoning its rights under an order, the owner was entitled to treat them as abandoned, and further, that a decision to acquire the property for purposes other than those contemplated in the order could be regarded as an abandonment of that order. In this case, it will be seen, the plaintiffs were able to vindicate their rights in the ordinary courts, and the limits of this remedy in such a case were defined by Upjohn, J., in the following terms:[6] 'This court,' he said, 'has an inherent jurisdiction to control the exercise of statutory powers if, but only if, it can see that the powers are being exercised not in accordance with the purpose for which the powers were conferred.'

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[5] [1957] 3 W.L.R. 314.

Fundamentally, the ultimate problem is not one of law, but of political theory. During the past sixty or seventy years, in all modern societies, it has become accepted doctrine that in wide spheres of public activity, certain aims which are regarded as generally desirable, should be pursued collectively in some cases at the expense of, or in other cases in abridgment of, private

[6] *ibid.*, at p. 321.

rights. The question to be solved, therefore, is how and to what extent the individual should be protected when he finds himself in opposition to a claim by a public authority. In some cases, as the Franks Report points out, action may be taken purely administratively, and in such cases, the individual's only remedy is by way of appeal to his Member of Parliament, or to the press. In other cases, however, it has become accepted practice that whilst the individual is denied access to the ordinary courts, he may nevertheless enjoy the benefit of certain procedures before tribunals, or before committees of enquiry which, usually, the appropriate department will have established under Parliamentary authority. Where this is the case, public confidence in such procedures will depend upon the general opinion which is held concerning the independence, impartiality and competence of these tribunals, and the openness with which their proceedings are conducted. It is this problem, in its widest aspect, which forms the subject of the Franks enquiry. As the Report puts it, with notable conciseness,[7] 'In this country, government rests fundamentally upon the consent of the governed. The general acceptability of these adjudications is one of the vital elements in sustaining that consent.'

GENERAL CHARACTERISTICS OF ADMINISTRATVE TRIBUNALS

The work of the Committee fell naturally into two parts. The first was concerned with the general characteristics of administrative tribunals; the second considered particular tribunals, or sets of tribunals in greater detail. In both parts of its work, the Committee was also necessarily concerned with the relation of the work of the tribunals to the ordinary courts. In the United States the overwhelming preponderance of opinion was in favour of permitting, in general, an appeal from administrative tribunals to the ordinary courts upon questions of law, but not upon questions of fact. The Donoughmore Committee had already reached the same conclusion, but no attempt has been made in the intervening years to give effect to this recommendation. Indeed the influence of the Departments has always been the other way, although this immunity from judicial review has been frequently condemned, and is difficult to defend on logical grounds.

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[7] Cmnd. 218 (1957), para. 22.

It is at this date hardly open to dispute that many of the questions which had arisen for determination before administrative courts, ought not, in the first instance, to be decided by the ordinary courts. The Permanent Secretary to the Lord Chancellor pointed out that if they had been so remitted, the structure of the judiciary itself would have had to be altered to deal with the increase of work and, it may be added, the change in its nature. More important, however, is the fact, stressed by the Donoughmore Committee, that administrative tribunals may have important advantages over the ordinary court in cheapness, accessibility, freedom from technicality, speed of decision and expert knowledge of a particular subject. Thus, administrative justice is a permanent feature of our legal system. The problem is therefore one of ensuring that adequate safeguards for the rights of the citizen exist, that the existing chaos of special jurisdictions is moulded into some kind of a coherent system of courts, and that proper provision is made for appeals to appellate courts of adequate status.

As far as this last point is concerned, two opposing views have held the field. On the one side, it has been strongly urged that there should be a general power of review by the courts of law over all decisions of administrative tribunals. This is the view which the Committee has accepted, and on this question the Committee had the benefit of supplementary memoranda from the General Council of the Bar and the Law Society upon the machinery whereby such general appeals on points of law should be brought to the court, which, it is contemplated, will be the Divisional Court. This court, as the Report points out, already exercises general supervision and control over all inferior courts in matters of jurisdiction, and is also constantly dealing with appeals on points of law, especially from magistrates' courts. From the Divisional Court, it is proposed that there should be one further appeal, by leave, and no more.

This recommendation, it will be seen, proposes a solution to the problem which is similar to that adopted in the United States. It is also one which has long been accepted in respect of inferior courts in England, and which has roots stretching far back into the past. In accepting this solution, the Franks Committee has rejected the proposal, long advocated by Professor Robson, that there should be a general administrative appeal tribunal, with jurisdiction to hear, not only appeals from tribunals and ministerial decisions which follow upon public enquiries, but also appeals against harsh or unfair administrative decisions in that considerable field of administration in which no special tribunal or enquiry procedure is provided. Professor Robson's proposal shows the influence of French thought upon administration and administrative law, impressed as it is with distrust for arbitrary power. The Franks Committee, though obviously interested in the proposal, were reluctant to engraft such a novel institution upon traditionally English stock; but it is at least open to enquiry whether an administrative appeal tribunal with such wide powers might not in the long run have proved a more effective buttress against arbitrary power than the proposed system. It would, at any rate, have had a wider range of action.

A second suggestion, that there should be an administrative division of the High Court, with general appellate jurisdiction over administrative decisions generally, was not so extensively considered.

The existence of a general right of appeal to the ordinary courts will in itself represent a considerable advance, for it will lead to the practice that administrative tribunals should give reasons for their decisions (thus removing the suspicion of arbitrariness that has frequently been expressed), it will tend towards the establishment of general principles in particular spheres of administrative jurisdiction, and it will ensure that proper standards are maintained in the realms of procedure. The Report, however, contains an important proposal, with far-reaching implications for the maintenance of more effective control over administrative tribunals than has been achieved in the past. The proposal is that there should be established two Councils or Tribunals, one for England and the other for Scotland. The functions of these Councils will be (1) to advise whenever a new type of tribunal is proposed, and (2) to keep under review the constitution and procedure of existing tribunals. This proposal owes much to the advocacy of Professor Robson and Mr. H. W. R. Wade. It was obviously regarded as one of very considerable importance, for the Report reveals an interesting and significant conflict of opinion upon the question of the official to whom the Councils should report. The Joint Permanent Secretary to the Treasury urged that they should report to the Prime Minister, on the ground that tribunals must be regarded as part of the machinery of administration. That, however, is a plea that goes to the root of the matter, and the Franks Committee very properly rejected it. The Committee was quite clear that tribunals are (or should be) not instruments of administration, but independent organs of administration, and it accordingly recommended that the English Council should report to the Lord Chancellor, and the Scottish Council to the Secretary of State for Scotland. This recommendation is the more important when it is realised that the Committee also recommends that the appointment of members of tribunals should be removed from the departments of State and given to the Councils. It would be over-optimistic to imagine that the recommendations of the Franks Committee will end the stubborn rearguard action which the departments have fought on this question; but the value of any measure which may be founded on the Report of the Franks Committee may be tested by the solution which such a bill recommends for this problem.

Obviously much will depend upon the calibre and independence of the persons who are appointed to these Councils. It is proposed that members of the Council for England and Wales should be appointed by the Lord Chancellor, and those for Scotland should be appointed by the Secretary of State for Scotland. They would be relatively small, comprising nine or ten persons, partly lawyers and partly non-lawyers, the latter being in a majority. The chairman would receive a salary, but the service of other members would normally be unpaid, and the Report adds:[8]

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[8] *ibid.*, at para. 134.

> 'Some members of the Councils should have experience of agriculture and industry. It is also desirable that the experience of voluntary organisations in the social service field and that of senior retired members of the public service should be available to the Councils. It would be valuable if a place were found amongst the legal members for an academic authority on administrative law or administration.'

The recommendation that the Councils should make appointments to tribunals is essentially a compromise. A strong body of opinion was in favour of placing all appointments in the hands of the Lord Chancellor. The Lord Chancellor's Department, however, was of opinion that this would unduly increase the work of the Department, so that eventually the Committee reached the conclusion that, whilst the Lord Chancellor might reasonably be expected to appoint the chairmen of tribunals, other appointments might be made by the Councils themselves. So long as the Councils are responsible to the Lord Chancellor, there seems little real objection to this suggestion.

THE PROCEDURE OF ADMINISTRATIVE TRIBUNALS

In considering the procedure of administrative tribunals, the Committee accepted as a starting-point the proposition that its relative informality was a valuable attribute, and that it was undesirable to introduce the complexities of procedure before the ordinary courts. They were, however, emphatic that hearings in public were essential, except where questions of security were involved, or where the proceedings involved the investigation of questions of a private or financial nature, where no public interest was involved, or finally, where questions relating to professional capacity or reputation were under consideration. They were also clear that possibility of legal representation should be excluded only in the most exceptional cases, and further, that where the private citizen was unable to enjoy legal representation, the Government Department concerned should be subject to a similar disability.

It is important in considering the general changes which the Committee advocates to appreciate the appellate system which is contemplated. In general (although there are one or two exceptions) there should be a general appeal, either on fact, law or merits from a tribunal of first instance to an appellate tribunal, reports of whose leading decisions should be available to the lower tribunals. There should not be an appeal from a tribunal to a Minister. The decisions of the tribunals, whether original or appellate, would be subject to review by the courts on points of law, either by way of certiorari or by appeal. Such a procedure naturally makes it imperative for tribunals to give reasons for their decisions, and so removes the difficulties which affected the use of certiorari in respect of decisions of administrative tribunals in the past, and which were discussed by Lord Denning a few years ago in *The Changing Law.*[9]

Since Lord Denning's book was published, the courts have steadily extended the availability of an order for certiorari in respect of decisions of administrative tribunals, and they have not been deterred by the circumstance that a decision of such a tribunal is declared to be 'final.'[10] A notable illustration of this was furnished recently by the decision of the Court of Appeal in *R.* v. *Medical Appeal Tribunal: Ex p. Gilmore.*[11] A medical appeal tribunal operating under the National Insurance (Industrial Injuries) Act, 1946, had awarded Mr. Gilmore compensation for injuries sustained at work which had rendered him almost totally blind. He considered the compensation to be inadequate and not to have been assessed in accordance with Regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulation, 1948. By section 36 (3) of the Act of 1946 it was provided that the decision of a tribunal on such a claim should be 'final,' but 'final' can only mean final, when this is in accordance with law. The Court of Appeal, however, might have experienced considerable difficulty in quashing the decision of the medical appeal tribunal had it not been for the fact that the adjudication had included an extract from the specialist's report, from which it appeared that certain factors, required to be considered by Regulation 2 (5), had not been considered. The

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[9] (1953), pp. 32 *et seq.*

[10] *Taylor* v. *National Assistance Board* [1957] 2 W.L.R. 189.

[11] [1957] 1 Q.B. 574.

Court of Appeal was therefore able to see in the decision, incorporating the extract from the specialist's report, an error of law, so warranting the intervention of the court by certiorari. However, Lord Justice Denning was able to point out that even if the specialist's report had not appeared in the decision, the court would still have been able to act, by ordering the tribunal to complete the record by finding the facts, as the regulations require them to do. Further, he pointed out that the court has always possessed the power to order an inferior tribunal to complete the record, otherwise, by failing to make a complete record, an inferior court or tribunal could always defeat a writ of certiorari. As Romer, L.J., said,[12] 'it would be deplorable if we were constrained to hold that the decision of a medical tribunal, however wrong in law, and however obviously wrong, was immune from review by Her Majesty's courts.' This case shows the readiness of courts to make available their powers of control over administrative tribunals where that is procedurally possible, but it would be more satisfactory, and it would avoid many technicalities, if a general power of review were to be established.

Part III of the Report considers particular tribunals, and it is of special value in confirming impressions of them which have been widely held by lawyers and others.

On the whole, whilst not closing the door to possible amalgamations of tribunals, to avoid undue multiplicity, the Committee accepts their existing structure and functions, although they mention the Lands Tribunal as a clear example of an amalgamation of various tribunals which has been strikingly successful. Practically no criticism of it was received by the Franks Committee.

Many criticisms were received by the Committee on the working of county agricultural executive committees, and it appeared from them that their working, as adjudicating bodies, was far from satisfactory. To mention only one defect, they combine both adjudicative and executive functions, so that fears concerning their impartiality are widespread. The Committee therefore recommends that they should be replaced by new tribunals, independent both of the Minister and the County Committees, and that there should be an appeal from these new tribunals to the Agricultural Land Tribunals. Although some members of the new tribunals should have knowledge of local agricultural conditions, an important change is proposed in that there should be a legally-qualified chairman, without local affiliations.

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[12] *ibid.*, at p. 586.

Equally unsatisfactory are the Rent Tribunals, whose functions have not been defined with sufficient clarity, and whose procedure is primitive. Here legally-qualified and paid chairmen should, in the opinion of the Committee, be appointed as quickly as possible, where no such chairmen exist already. The Committee also pointed out the desirability of including a valuer among the members where this is possible. Unfortunately, it seems to be certain that the number of references to these tribunals will remain large for some years to come, and the Committee therefore regards it as essential that there should be an appeal to an appeal tribunal comprising the county court judge, sitting with a qualified valuer as assessor. This, coupled with the supervisory control of the Council on Tribunals, should go far towards preventing the excesses of jurisdiction which have been a striking feature of the working of these tribunals in the past, and whose jurisdiction has, in any event, been curtailed by the Rent Act, 1957.

PUBLIC ENQUIRIES

Parts IV and V of the Committee's Report are concerned, practically exclusively, with administrative procedures which involve, not an adjudication by a tribunal, but an enquiry or hearing, and these procedures relate almost exclusively to land, the use of which is now controlled by extensive legislation and an abundance of administrative regulation. It is not possible, in a general survey, to mention or comment upon the many valuable suggestions made by the Committee to improve the existing state of things, but one or two points of general interest may serve to illustrate the attitude which the Committee had adopted to deal with this extremely important question.

Where land is compulsorily acquired for public purposes, it may either be acquired by a Ministry or by a local authority or other public body. In either case there must be a hearing before a person appointed by the Minister, so that those who object have the opportunity to explain their objections. The courts have held that where the Minister is deciding whether to confirm the proposal of a local authority he is in substance deciding an issue between two parties, *viz.*, the local authority and the objectors, but where the Ministry is itself acquiring the land, the Minister is acting administratively. The procedure followed under the Town and Country Planning Act, 1947, is substantially similar to that for the compulsory acquisition of land for public purposes. Notice must be given to persons likely to be affected, there must be an enquiry, and finally a ministerial decision.

Within this apparently simple framework is to be found one of the most hotly debated problems in the whole field of administration. It is whether the procedure must be regarded as essentially administrative, and is advancing the purposes of government, or whether it is basically to ensure that there is a proper determination of conflicting public and private rights by means of a procedure which is essentially judicial. The problem could, of course, be restated in a variety of ways. It could be expressed as a dispute concerning the extent to which public need, as expressed in executive action should prevail over private right; or again as the problem of determining whether government in its administrative manifestations, should be completely free from control by the courts, provided it is acting with statutory authority. This, again, is not quite the end of the matter for presumably only the courts can determine whether government is, in fact, acting within its province, as defined by statute, and this in itself may prove to be a complex question. It may involve the determination of the question whether any mode of exercising statutory powers is permitted, or whether there are possible alternatives; and many other derivative questions may easily arise.

The Report not unnaturally reaches the conclusion that the procedures are neither purely administrative nor purely judicial, and the Report therefore follows the line of seeking a means of securing a just balance between conflicting public and private interests. From this point of view, the tests of openness, fairness and impartiality are just as important as they are in respect of decisions of administrative tribunals. But the Report also stresses a factor which has too often been minimised.[13] 'The evidence we have received,' it says, 'shows that much of the dissatisfaction with the procedures relating to land arises from the basis of compensation. It is clear that objections to compulsory purchase would be far fewer if compensation were always assessed at not less than market value.' To which we may add that until it is, the public interest is necessarily being advanced at the expense of those unlucky owners who have failed to take effective evasive action.

The Committee stresses the need for any acquiring authority to make available in good time a written statement giving full particulars of its case, and the Minister should also make a statement of policy relevant to the case; but the most important suggestion is that the inspectors who play such an important part in enquiries by the preparation of reports should be placed under the control of the Lord Chancellor, although they may remain in contact with policy developments in the Departments which are responsible for enquiries. This suggestion, if adopted, would remove the suggestion of bias on the part of inspectors, which may be ill-founded but which is none the less widespread. The Committee also suggets that the Council on Tribunals should prepare a code or codes of procedure for the conduct of enquiries, and that it should be made statutory. Moreover, it suggested that provision should be made for the payment of costs to successful owner appellants or objectors, and a further long-overdue reform suggested is that the complete text of an inspector's report should accompany the Minister's decision. As far as appeals on questions of law are concerned, these, in the normal case, would only arise (as now) on questions of jurisdiction or procedure, and the Committee therefore suggest that the existing system should be retained, and that it should be extended to planning appeals in the same way that it applies to decisions in other cases relating to land. Of course, if a code of procedure is enacted, that in itself will make the possibility of appeal on procedural grounds stronger, and will doubtless prove the foundation for as comprehensive a system of judicial review as the nature of this type of enquiry permits.

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[13] Cmnd. 218 (1957), para. 278.

This brief survey of the ground covered by the Report of the Franks Committee will perhaps emphasise its vigorous approach to a question that has become the more difficult to solve the longer it has been neglected, and which has provoked periodic outbursts of popular resentment, to say nothing of a formidable accumulation of case-law. In some respects, the proposals are far-reaching, for example, in suggesting the establishment of Councils on Tribunals, and in proposing that all chairmen of tribunals and inspectors for enquiries should be appointed by the Lord Chancellor. Having regard to the obstinacy of the Departments in resisting the curtailment of powers to by-pass the courts, which ought never to have been conceded, it cannot be expected that the resistance movement in Whitehall ended with the publication of the Report. On the other hand, those who wish to see not only the extent, but the implications of permitting administrative jurisdiction to escape from judicial control will find that the Franks Report has an effective answer to give.

SUPPLEMENTING THE REPORT

In the course of a speech in the House of Lords—during a discussion of the Franks Report on November 27, 1957, Lord Denning remarked that the great merit of the Report was that it was unanimous and that it was accepted by all parties and by the Government. This has, indeed, been most clearly evident in the reception which it has received in the press, and notwithstanding the pressure upon Parliamentary time, the Government has taken an early opportunity to make clear its intentions upon the recommendations of the Report. In his statement in the House of Lords on November 27 the Lord Chancellor announced that the Government accepted the thesis that there should be a statutory body to review the constitution and working of tribunals, but he stated that it had been decided to create a single council, set up by the Lord Chancellor and the Secretary of State for Scotland jointly, although the Council would establish a separate panel to deal with matters of special concern to Scotland. Legislation providing for the establishment of the Council would be introduced as soon as possible, but one important change which it was proposed to make was that Ministers should retain the right to appoint members of tribunals, which they would exercise after consultation with the Council. This, it will be seen, represents a concession to Departmental opinion, which was known to be directly opposed to any such transfer.

Other important changes, the Lord Chancellor announced, could be introduced without legislation. The restriction on the right of legal representation before the tribunals would be abolished, and beginning in January, 1958, the Government would put fully into operation the following recommendations in the Report—

67—for making available particulars of a case before the enquiry;

71—which provides that where the Ministry or other authority is to explain proposals fully at an enquiry, the proposals shall be supported by oral evidence;

75—providing that officials of a department will give evidence at the enquiry in certain circumstances;

80 and 82—which provide for the publication of inspectors' reports;

84—which provides that the Minister's letter reporting a decision shall set out the findings and the reasons for the decision;

and 92—which provides that local planning authorities shall discuss applications with the appellants.

The Lord Chancellor also announced that in future Ministers will require authorities to see that their case is properly set out before an enquiry opens; and further, where an inspector makes recommendations, these will in future be published as part of the report.[14]

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[14] See November 27, 1957: *Parl. Deb., Official Report,* House of Lords, Vol. 206, cols. 572–92. See also the speech of the Home Secretary (Mr. R. A. Butler), October 31, 1957: *Parl. Deb., Official Report,* House of Commons, Vol. 575, cols. 400–18.

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LOCAL GOVERNMENT IN LONDON

W. O. Hart

Local government in England and Wales is in process of a measure of reorganisation. Three White Papers were issued in 1956 and 1957 dealing with its framework, its finances and its functions.[1] The immediate changes to be made in the law have been embodied in a Local Government Bill now before Parliament.

The first White Paper[2] was concerned with the 'Areas and Status of Local Authorities in England and Wales.' It contained proposals for overhauling the areas within which local government is administered. It recognised the exceptional problem of the conurbations—the large built-up areas, usually divided for purposes of local administration between numerous authorities of different types and sizes, often in the haphazard fashion which has resulted from the running together of their areas, as building overran their boundaries. The White Paper also recognised that the largest conurbation of all, that of Greater London, was unique, and that the administrative counties of London and Middlesex, both of which lie wholly within that conurbation, presented special problems. It was in accord with this idea that, on November 19 last, the Prime Minister announced in the House of Commons the appointment of a Royal Commission

> 'to examine the present system and working of local government in the Greater London area: to recommend whether any, and if so what, changes in the local government structure and the distribution of functions in the area, or in any part of it, would better secure effective and convenient local government.'[3]

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[1] Local Government. Areas and Status of Local Authorities in England and Wales: Cmd. 9831 (1956); Local Government. Functions of County Councils and County District Councils in England and Wales: Cmnd. 161 (1957); Local Government Finance (England and Wales): Cmnd. 209 (1957).

[2] July, 1956: Cmd. 9831.

[3] The Local Government Bill makes corresponding provision. Clause 17

ADMINISTRATIVE DIVISIONS OF THE GREATER LONDON AREA

The Greater London area, the local government in which the Royal Commission is to examine, is defined in its terms of reference as covering the Metropolitan Police District and the City of London, together with certain adjoining built-up areas.[4] In addition to the whole of the administrative counties of London and Middlesex it includes parts of the administrative counties of Essex, Hertfordshire, Kent and Surrey. In this area of some 846 square miles live nearly eight and three-quarter million persons (or rather more than one-sixth of the population of Great Britain). Though few of them may be able to tell where administrative boundaries within it lie, the area is for purposes of local government sharply divided into an inner core, consisting of the administrative county of London, and a surrounding outer band.

In describing the contrasting systems of administration in these two parts of the Greater London area, one is forced to recognise that local government law is mainly institutional. Unlike what one may call 'lawyers' law,' it is not primarily directed to the definition of rights and duties, but is concerned rather with laying down how local authorities shall be constituted and with the powers which they may exercise, whether as a matter of discretion or duty. It is a branch of administrative law which, within its limited field, performs much the same functions as constitutional law in its wider one. Hence, just as constitutional law cannot be understood without some excursion over its strictly legal boundaries, so local government law can only come to life if its setting of functions and purposes, whether social or political, is brought into the picture.

In the outer band of the Greater London area the system of

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excludes the 'metropolitan area' (defined in Fifth Schedule) from the scope of the Local Government Commission. Clause 49 similarly provides that the provisions for delegation of functions in Part III shall not apply to the metropolitan area, but all or any of these provisions may be extended to the whole or part of it. It will be seen that there has been a change from the proposals in the White Paper, since the Local Government Commission will not be able to review any part of the Greater London area.

[4] These are the boroughs of Dartford, Romford and Watford, the urban districts of Caterham and Warlingham, Chorley Wood, Hornchurch, Rickmansworth and Walton and Weybridge, and the parish of Watford Rural in the rural district of Watford.

local authorities is no different from that found in the rest of England and Wales, and follows the normal pattern established by the Local Government Acts of 1888 and 1894. By these two Acts—to quote a convenient passage from the White Paper on 'Areas and Status of Local Authorities'[5] which succinctly describes the position:—

> 'Two separate systems were set up—one for the county boroughs and another for the counties. In the county borough a single authority was entrusted with the administration of all local government services in their area. On the other hand the counties were organised on the so-called "two-tier" system. Under this system the responsibility for some services lies with the county council, and for others with the councils of county districts (non-county boroughs, urban districts and rural districts). In rural districts certain functions are performed by parish councils or parish meetings.'

In this outer band of the Greater London area there are three county boroughs, Croydon and East Ham and West Ham, in each of which the borough council is alone responsible for all local government services. So far as the two-tier system is concerned, there are parts of the administrative counties of Essex, Hertfordshire, Kent and Surrey, those parts together comprising twenty-four non-county boroughs, twenty urban districts, one rural district and three rural parishes forming parts of two further rural districts. There is also the whole of the administrative county of Middlesex divided into eighteen non-county boroughs and eight urban districts.[6] But Middlesex presents a special problem. It

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[5] Cmd. 9831 (1956).

[6] The position is:

	Non-county boroughs	*Urban districts*	*Rural districts*	*Rural parishes*
Essex (part)	8	3	—	—
Herts (part)	1	6	1	3 (in 2 R.D.s)
Kent (part)	5	4	—	—
Surrey (part)	10	7	—	—
Middlesex (whole) ...	18	8	—	—
Total	42	28	1	3

is a wholly urban county. Within it lie no less than eleven boroughs each with a population above the statutory minimum for promotion to county borough status, which would take it outside the administrative county. The White Paper on 'Areas and Status of Local Authorities' summed it up by saying:—

> 'In fact in Middlesex there are really only two practical alternatives—either to have no county boroughs at all, or to have nothing but county boroughs and abolish the county.'[7]

The central core of the Greater London area is formed by the administrative county of London. This comprises an area of 117 square miles, within which live some 3⅓ million people. It includes the City of London, an area of one square mile, occupied at night by a resident population of some 5,000, which during working hours of day time expands to half a million. The City is itself a county, but not an administrative county, the latter term having been introduced by the Local Government Act, 1888,[8] to denote the area within which a county council should exercise administrative powers. Prior to 1889 there was no county of London, but that Act constituted a county of London out of parts of the counties of Middlesex, Kent and Surrey, as they then were, and provided that it, together with the City of London, should form the administrative county of London.[9] The county of London is thus by far the newest of those ancient divisions of the country which for so long have served as areas of jurisdiction and local patriotism. Though as lawyers we pay respect to the omnipotence of Statute and to the maxim that ignorance of the law is no excuse, it is not easy to ensure that the effects of statutory changes in fields that are unexpected will always be readily appreciated. For instance, though some 116 square miles of London (exclusive of the City) had by statute been a separate County for over fifty years, the College of Arms in 1944 still regarded Chelsea as lying within the county of Middlesex, and first recognised the existence of the county of London in the creation of the Duke of Edinburgh as Baron Greenwich.

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[7] The Government considered the two-tier structure should be retained throughout Middlesex and that no promotions to county borough status should be made.

[8] Sections 1 and 100; Local Government Act, 1933, s. 1.

[9] Local Government Act, 1888, s. 40.

The administrative county of London, the material area for modern local government, possesses a peculiar system of local administration. As in other administrative counties throughout the country, this is a two-tier system under which one authority exercises certain functions over the whole area, while each of a second-tier of authorities exercises other functions within separate parts of the whole area. But the London system at both its levels differs from the system established elsewhere in the country. The London County Council, both in structure and in functions, is peculiar. Thus, for example, its membership has only half the proportion of aldermen found in other county councils: its councillor members are elected for the Parliamentary constituencies in the administrative county;[10] it does not seek Ministerial sanction to authorise the borrowing of capital moneys, but annually promotes its own Money Bill in Parliament; while, unlike other county councils, it is a housing authority and has main drainage and sewage disposal powers.

The second-tier consists of the Corporation of the City of London on the one hand and twenty-eight metropolitan borough councils on the other. The City is in a special, indeed a unique, position both as to its constitution and the activities it undertakes. The metropolitan borough councils were the creation of the London Government Act, 1899, and differ in form and scope from normal borough councils in much the same way that the London County Council differs from other county councils. Thus, again for example, the metropolitan borough councils are statutory corporations; they have half the proportion of aldermen found elsewhere; their councillors are elected *en bloc* at triennial elections; and all their accounts are subject to district audit.[11]

The system of local government in the administrative county of London is thus peculiar in the constitution of the authorities, in the distribution of functions and in the relations between them. But in a different sense nearly the whole of the Greater London area which is to be examined by the Royal Commission has peculiarities common both to its inner core and its outer band. The fact that it is wholly built-up, that it contains the seat of Government of the country with all the consequences that flow from the fact, give it a special character, at any rate, of a physical and political nature. But it is also exceptional in matters of administrative law, mainly owing to the existence within it of *ad hoc* authorities carrying on services which elsewhere in the country are not normally withdrawn from the scope of the regular local authorities. This special organisation within London is in part the result of historical accident and in part the product of the exceptional conditions in this vast conurbation, where considerations of technical efficiency for certain services may point to areas of administration which differ from those better suited to the general run of local government services.

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[10] Local Government Act, 1888, s. 40; London Government Act, 1939, ss. 7 and 11; Representation of the People Act, 1948, s. 59.

[11] London Government Act, 1939, ss. 17, 21 and 23; Local Government Act, 1933, s. 219.

The earliest example of this special treatment is the Metropolitan Police Force. Within the City of London police is a local government service maintained by the Corporation under the City of London Police Act, 1839. Outside the City the Metropolitan Police Force was established in 1829,[12] under a Commissioner, who is directly responsible to the Home Secretary for its administration. The Force is financed partly by the Treasury and partly by precepts issued by the Receiver of the Metropolitan Police District to the rating authorities within the District, which is contained within a rough circle of fifteen miles radius from Charing Cross.[13]

Another *ad hoc* authority is the Metropolitan Water Board. This was set up in 1902[14] to acquire the undertakings then carried on by eight water companies and two urban district councils.[15] The Board has 88 members, who are appointed by the London County Council, the Common Council of the City of London, the metropolitan borough councils and other local authorities within its limits of supply, and by the Thames Conservancy and Lee Conservancy Board, from which rivers large supplies are drawn. The Board's area includes all the administrative county of London and parts of Essex, Hertfordshire, Kent, Middlesex and Surrey, the whole extending to some 576 square miles.

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[12] Metropolitan Police Act, 1829.
[13] Police Act, 1946, s. 16 and 4th Schd.
[14] Metropolis Water Act, 1902.
[15] Tottenham and Enfield.

A somewhat similar body is the Port of London Authority established in 1908.[16] The Authority consists of a chairman and twenty-eight members, partly elected by users of the port and partly appointed by the Admiralty, the Ministry of Transport, Trinity House, the London County Council and the Corporation of the City of London. The port extends up the Thames as far as Teddington Lock, and over the whole of it the Port Health Authority is the Common Council of the City of London.[17]

In common with the rest of the country public utilities and hospitals in London have passed out of the field of local government with the nationalisation of gas and electricity and the establishment of the national health service.[18] Passenger transport, both on the streets and by underground and rail, in London and over a wide area around, is operated by the London Transport Executive which, though a product of the nationalisation of transport, is the successor of the London Passenger Transport Board established as an *ad hoc* authority over Greater London in 1933.[19]

In the Greater London area there are thus peculiarities caused by the existence of these *ad hoc* authorities and the withdrawal from the field of local government of services which elsewhere are provided by normal local authorities. Moreover, the Royal Commission is not to trespass outside the field as so restricted, since it is forbidden to consider any changes in the administration of police or the provision of water supply. The area as a whole, of course, is subject to the problems which exist in a conurbation, but except for its size and its importance as containing the capital of the country, their effect in London seems not to differ in kind from their effect in other conurbations. Their solution must presumably be sought by striking a balance on the one hand between the need for uniformity throughout the area, and on the other hand the need for preserving and promoting the sense of local community.

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[16] Port of London Act, 1908.

[17] Public Health (London) Act, 1936, s. 5.

[18] National Health Service Act, 1946; Electricity Act, 1947; Gas Act, 1948.

[19] London Passenger Transport Act, 1933.

Apart, however, from these peculiarities local government in the Greater London area is normal, both in structure and function, save within its central core formed by the administrative county of London. It is of some interest to inquire how local government in this inner London came to differ from the system found in all other counties.

HISTORICAL GROWTH

The City

The first settlement of importance in what is now the administrative county of London was in the City. It certainly existed from Roman times and owed its significance to its control of the lowest crossing of the Thames and its position as the country's greatest port. Its earliest charter was granted by William I, but London is a corporation by prescription. Its many charters are typical, or perhaps one should rather say form the pattern, of borough incorporation and municipal government. They were much copied by other boroughs, and it has been said that one hundred and fifty other places modelled their constitution upon London.

Some special privileges granted to the Corporation by its charters may be mentioned. London not only farmed its own borough, but by the charter of Henry I (1132) it was granted the farm of the County of Middlesex. It was for this reason that the City still chooses two Sheriffs, though the Local Government Act, 1888, took away from the City the right to appoint a Sheriff of Middlesex.[20] Again, the charters of Edward III (1341) and Richard II (1377 and 1383) recognised the right of the Corporation to alter its own constitution by Act of Common Council. Thus, for instance, by an Act of Common Council of November 27, 1952, the number of common councilmen will be reduced from 206 to 159 as from St. Thomas's Day, 1959.[21]

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[20] Local Government Act, 1888, s. 46.

[21] December 21.

The principal administrative body of the Corporation is the Court of Common Council and it is upon that body that statute has usually conferred modern local government powers. The Common Council consists of the Lord Mayor, twenty-five other Aldermen, and 206 Common Councilmen. The last are elected annually in the twenty-five Wardmotes, election being by show of hands, with, however, a ballot if a poll should be demanded. The aldermen are also elected in the Wardmotes, but hold office for life.

The Court of Common Hall consists of the liverymen of the City companies and is concerned in the election of certain officers, including the Sheriffs and Lord Mayor. The last is chosen by the Court of Aldermen from two aldermen who have held the office of Sheriff and who are selected for nomination in the Court of Common Hall.

The City Corporation is also in an exceptional position so far as concerns its functions and the financial rules which relate to it. As a common law corporation it is not subject to the modern doctrine of *ultra vires* any more than is any other common law corporation. So far, however, as its functions are statutory and specifically regulated by statute it must similarly be subject to answer in the courts for any infringement of those regulations.[22] But whereas other common law corporations subject to statutory regulation are often unable, at any rate in the municipal field, to fall back on non-statutory powers because their finances are so tightly regulated by statute, the City Corporation has other financial resources of which it can sometimes make use and which have escaped statutory control. Thus, in addition to the rate income, there is the 'City's Cash' which derives its revenue from rents of lands, rents and tolls of markets owned by the City, and certain legal fees and fines. This quite substantial source of income is spent partly on statutory services in relief of the rates, and partly on non-statutory objects such as the schools and courts maintained by the Corporation and on hospitality and ceremonial expenditure. Again, the Bridge House Estate is held by the Corporation on trust for the maintenance of the London, Southwark, Blackfriars and Tower Bridges, and the Corporation administers other trust funds.

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[22] *Bonanza Creek Gold Mining Co., Ltd.* v. *R.* [1916] 1 A.C. 566.

The area of the City has remained practically unchanged since Norman times in spite of the growth of the huge built-up area that now surrounds it. At one time it looked as if the City might expand as development took place beyond its boundaries. Thus the charter of Edward III (1327), reciting that felons and malefactors fled from the City across the Thames to Southwark, gave the City jurisdiction over that place. This was taken further by the charters of Edward IV (1462) and Edward VI (1550) which provided that the City should become lord of the three manors in Southwark and that the City courts should apply City law there. Of these the Second Report of the Municipal Corporations Commissioners of 1837 said—

> 'It was unquestionably intended by the charter of Edward VI that the Borough of Southwark should be incorporated for all municipal purposes with the City of London and we cannot understand why the Corporation should have declined to make Southwark effectively a part of the City.'

Whatever the reason, the City did not treat Southwark as part of itself, and thereafter there was no sign of the City contemplating any extension as building continued beyond its boundaries. Indeed, the Corporation uniformly resisted the attempts which nineteenth century reformers, anxious to recapture what they regarded as a missed opportunity, made to enlarge the City to coincide with the still growing town around it. Moreover, the City Corporation had not been touched by the Municipal Corporations Act of 1835, which reformed into a uniform pattern other municipal corporations throughout the country. After that date, therefore, two questions were repeatedly asked about the City of London: should the Corporation be reformed; and, should the area of its administration be enlarged?

In their Second Report of 1837 the Municipal Corporations Commissioners referred to the general principle of including suburbs in the town around which they had grown up. This principle had been applied in other boroughs to bring the whole area of the effective towns under the control of the reformed corporations. They saw no reason why, in spite of its size, the same principle should not be applied to London. The point was not at that time taken any further. In 1853, however, a Royal Commission was appointed to inquire into the Corporation of the City of London. In its report it disagreed with the view expressed in 1837, on the ground that the size of the total built-up area would prevent there being present that minute local knowledge and that community of interest which were essential for municipal government.

In 1884 a Government Bill was introduced into Parliament to reform the City Corporation and extend its jurisdiction over the whole of London. The Bill was not passed, but the movement which lay behind it influenced the Local Government Act of 1888 in so far as it provided for the establishment of the London County Council.

A last attempt to extend the City was made in 1894 when a Royal Commission was appointed to consider amalgamating the City with the County. As a result of its report[23] there was passed the London Government Act, 1899, which did not touch the City, but reformed the second-tier authorities in the remainder of the administrative county and established the metropolitan borough councils.

Though the City did not extend its area of administration as the town expanded beyond its boundaries, the growth in area and population of the suburbs around it went on with increasing rapidity. In addition to the City, Westminster developed early and building between the two was soon continuous. In 1600, the population of the growing built-up area has been estimated as 180,000; by 1700 as 550,000; in 1801 it was over 850,000; in 1871 it was three and a half million.

The special organisation which in the Middle Ages developed in the City and other incorporated towns was intended to deal with the problems which an urban congregation of population was likely to create, at any rate as understood at that time. In this the City Corporation was an advanced piece of local government machinery. As the suburbs grew around the City more and more densely, they were, however, left to the normal system of local government established to meet the needs of rural areas outside the incorporated towns. This proved ill-suited for the urban conditions found in the growing Metropolis. Moreover, it was here, around London, that this problem of the large unincorporated town was first faced. It recurred later in the North and Midlands at the time of the Industrial Revolution, but by then some progress had been made in solving it in London, and the remedies could the more speedily be applied in the industrial towns.

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[23] Cmd. 7493 (1894).

The London Suburbs

To understand how ill-adapted was the normal system of local government for the London suburbs, it is necessary to look briefly at that system as it existed when it was called on to bear this exceptional strain. With the decay of the manor as an effective unit for controlling local affairs, Tudor legislation had established a new system, based on the parish and controlled locally by the justices of the peace. By the Statute for the Mending of Highways of 1555[24] the parochial vestry was to choose annually two surveyors of highways who were to see that the parishioners each laboured for four days in the year at mending the highways in the parish. This four days of 'statute labour' was soon increased to six[25] and the control by the justices was regularised by the requirement that they should hold special highway sessions at which the surveyors should be appointed.[26]

A somewhat similar arrangement was established by the Poor Relief Act of 1601.[27] Overseers of the poor were to be chosen annually by the vestry and—a matter full of significance for local government down to the present day—the overseers were to have powers of rating the inhabitants of the parish to pay for the relief of the poor. Again the procedure was closely controlled by the justices of the peace.

Preservation of order was locally the function of the constable, who had been known to the law before Tudor legislation gave prominence to the parish. But with that prominence he came to be regarded as a parochial officer and often to be nominated by the vestry. A statute of 1662[28] indeed provided that, where the leet made default in so doing, two justices should appoint the constable, and it allowed the levy of a parochial constable's rate, thus identifying the constable with the parish.

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[24] (1555) 2 and 3 Ph. & M., c. 8.

[25] (1562) 5 Eliz. I, c. 13.

[26] (1691) 3 Wm. & M., c. 12.

[27] 43 Eliz. I, c. 2.

All these parochial officers—surveyors of highways, overseers of the poor, constables—were unpaid and could be compelled to take up their merely annual offices. A system of local government depending upon them and upon the personal labour of the inhabitants in physically mending the highways could work in a village where it was possible for each inhabitant to know all the rest, where agricultural labour was the staple employment and where problems of local administration were few and simple. But it soon became wholly inappropriate to large, densely developed, urban areas where none of these conditions existed.

Main roads leading out of the City were beyond the parochial resources of the suburbs through which they passed. Streets needed paving, draining, scavenging and improving on a scale far beyond the requirements of rural lanes. The parish constable was incapable of dealing with the dense population: at least a regular system of watching and of street lighting was needed. Many nuisances, which in the country might cause little real danger, needed a quick procedure for summary suppression now that the leet was no longer available for this purpose: their remedy could not wait the slow course of an action at law. Main drainage became a necessity in an area covered with houses and streets, if only to carry away safely the storm water which impervious roofs and streets prevented from soaking into the ground. Again the parochial vestry became unwieldy when its membership was too numerous for effective action.

Where a new estate in one ownership was laid out and developed, to a limited extent some of these requirements could be met by covenants. In this way the occupiers of houses could be required to pave and clean the streets; square gardens could be maintained; lighting could be provided by trustees with the right to call for contributions towards the cost. But the scope for thus overcoming the defects of the local government system was limited in several ways. For instance, so far as contributions in money were concerned, the remedy of action upon the covenant made too dilatory such a contractual substitute for the statutory power of rating supported by its speedy remedy of distress. In any event the effectiveness of covenants was limited by the rule in *Spencer's Case*[29] which confined their positive use to leasehold estates. It was not until 1848 that the Court of Chancery in *Tulk* v. *Moxhay*[30] recognised that restrictive covenants could run with the land even though there was no privity of estate—and incidentally at the same time ensured that the centre of Leicester Square has been preserved from building.

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[28] 13 & 14 Car. II, c. 12.

The normal system of local government of those days proving inadequate to meet the needs of the growing Metropolis, and private law concepts being unable to supplement it sufficiently, resort was perforce had to what became during the eighteenth century a widely adopted expedient, that is, local legislation. By local Acts of Parliament special bodies were established which were given the necessary statutory powers, including the all-important one of raising money by compulsory means.

From the end of the seventeenth century turnpike trusts began to be so established to build or improve and maintain the through traffic roads. In this way the burden was taken off some of the parishes around London and the financial cost was laid on the users of the roads. In 1826 the fourteen turnpike trusts in the Metropolis north of the Thames were amalgamated.

Similarly many bodies of trustees or commissioners were incorporated by local Acts with power to pave, scavenge and light streets in their areas, and to these basic powers were often added others of a like nature. Tudor legislation had required the frontagers of particular streets in London to pave them,[31] and in 1662 a Statute required householders in London and

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[29] (1583) 5 Rep. 16a.
[30] (1848) 2 Ph. 774.
[31] e.g., Strand Paving Act, 1532.

Westminster to repair and light the streets before their houses. It also provided for the appointment of commissioners to construct and enlarge sewers, to remove nuisances, to cleanse and improve the streets and to license hackney carriages.[32] In 1691[33] the general rules were elaborated and applied to the whole Metropolis within the 'Bills of Mortality,' being enforced by Quarter Sessions. From the middle of the eighteenth century a new body of paving commissioners was established for Westminster. Further afield local Acts conferred similar powers—including the important power of rating—upon the vestries, or district boards covering two or more parishes, or upon bodies of commissioners or trustees, sometimes elected by the vestry. The result of this piecemeal treatment was an extraordinary chaos, both as to the size and boundaries of the areas for which these paving authorities were responsible, leaving many gaps between them, and as to the lack of co-ordination of the varied powers possessed by these bodies.

An attempt to remedy this was made by Michael Angelo Taylor's Act, 1817 (the Metropolitan Paving Act). The ghost of this Act, in its provisions for compulsorily acquiring land for street improvements, has survived to disquiet the Franks' Committee in these modern times, but this was only one of the powers which it sought to make uniformly available to the various paving authorities of its day. In addition it empowered them to extend their boundaries in order to fill the gaps which were then without any authority for street management.

A somewhat similar story can be told of the poor law. A Commonwealth Ordinance of 1647 first provided for a Corporation of the Poor of the City of London. Its existence and powers were confirmed by Statute[34] after the Restoration, and powers were conferred to establish similar corporations for Westminster and other parishes within the Bills of Mortality. Local Acts in the second half of the eighteenth century set up bodies of guardians, trustees or governors of the poor elected by parochial vestries. Complete uniformity with the rest of the country was not imposed even by the Poor Law Amendment Act, 1834, which generally removed the poor law from the vestries and established the guardians of the poor acting in unions of parishes, and it was not until the Metropolitan Poor Act of 1867 that the older incorporations in London were brought into line.

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[32] 13 & 14 Car. II, c. 2.

[33] 2 Wm. & M., sect. 2, c. 8.

[34] 13 & 14 Car. II, c. 12 (1662).

Drainage in London and its environs depended upon another piece of Tudor legislation, the Bill of Sewers of 1531.[35] This put upon a statutory footing the commissions of sewers which had been issued by the Crown from early times. These commissions established courts of record with the dual object of compelling fulfilment of individual drainage obligations and of carrying out communal works, supported by a power of rating the properties benefited. The primary purpose was land drainage and protection against flooding, but, in a built-up area, this inevitably included the provision of a rudimentary main drainage system, since the streams controlled in fact became main sewers in the modern sense of the term.

Within the built-up area outside the City there were seven commissions of sewers. But again there was no co-ordination of their work until the Metropolitan Sewers Act of 1848 replaced the old separate commissions with one new Commission of Sewers for the whole Metropolis outside the City.

Inside the City an interesting parallel development took place. The Act for rebuilding the City of London after the Great Fire[36] provided that the Common Council might appoint persons to design and set out places for common sewers, drains and vaults and to order the manner of paving and pitching the streets, together with a power of rating. This was a temporary Act intended to remain in force only while rebuilding was in process. It provided, however, that, while it remained in force, no commissioners of sewers should exercise their powers within the City. In 1671[37] the temporary powers were made perpetual. This raised doubts whether the persons appointed by the Common

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[35] 23 Hen. VIII, c. 5.

[36] 18 & 19 Car. II, c. 8 (1667).

[37] 22 & 23 Car. II, c. 17.

Council under the Act acquired the powers of commissioners of sewers within the City, and in 1708 an Act[38] was passed declaring this to be so. Thenceforth the persons appointed by the Common Council were called the Commissioners of Sewers of the City. An Act of 1766[39] consolidated and enlarged powers of paving, cleansing, lighting and improving the streets in the City and of rating, and declared that these powers should be exercised by the Commissioners of Sewers. These and other amending statutes were repealed and renewed in more modern form by the City of London Sewers Act, 1848, which conferred on the Commissioners of Sewers of the City all the regular street, sanitary and regulatory powers which were normal at that time. Later legislation amended this code and gave further powers to the Commissioners, who thus tended to become the City's real local authority in the modern sense of the term. This strange separation of the executive functions from the Corporation was not finally ended until the City of London Sewers Act, 1897, abolished the Commissioners and transferred their powers to the Common Council.

Police in the Metropolis is a different story. The change in the character of the parishes surrounding the City was too much for the parochial constables and for the retention of an uncorrupt magisterial bench. 'Trading Justices,' living off the fees they took, emphasised the failure of the system. Meanwhile, since the end of the sixteenth century, the magistrate sitting at Bow Street had in fact been paid a salary by Government and had gradually collected a force of professional constables, the 'Bow Street runners.' This formed the precedent for the Metropolitan Justices Act of 1792, which established seven new police offices at which stipendiary magistrates should sit, each supported by six paid constables, the whole being the responsibility of the Home Secretary. The trading justices were effectively driven out by a prohibition against any other justices taking fees in the areas for which the stipendiaries sat. Further police courts and stipendiaries were added later and the rules designed to stop trading justices now remain as a limitation on the jurisdiction which may be exercised by the county of London justices in those divisions in which a police court has been established.[40]

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[38] 7 Anne, c. 9.
[39] 6 Geo. III, c. 26.

The final step was taken by the Metropolitan Police Act of 1839 which established the police force on its modern footing. This Act did not, however, extend to the City. There the constables had become ward officers and were as unsatisfactory as their parochial counterparts outside. In 1737[41] an Act was obtained to give the Common Council power to raise a rate to maintain a nightly watch. For daytime protection 'extra' constables were appointed and paid, either from the City's Cash or by the bodies which made use of their services. About 1800 a more regular professional force was employed, its cost being met out of the City's Cash. In 1838 a Government Bill was brought in to include the City within the Metropolitan Police District. This led to negotiations resulting in the City of London Police Act, 1839, under which the Common Council appoints a Commissioner of Police for the City and he in turn appoints constables within the numbers laid down by the Common Council and, subject to the control of the Home Office, frames regulations for their conduct.

In the result, therefore, save in the City, police is not a local government service in the Metropolis. But the services which remained within the scope of local government were scattered among a bewildering, if not chaotic, variety of authorities. The next development needed was a gathering together of the threads.

THE MOVE TOWARDS INTEGRATION

The impetus towards integration came from the Royal Commission set up in 1853 to inquire into the then existing state of the Corporation of the City of London. In their report of 1854 the Commissioners recommended that local services in the Metropolis should be administered by several municipalities together with a central Board of Works. The position at that time was that a considerable step had been taken in 1848 to unify and modernise the position of the commissioners of sewers. In other respects outside the City there were the quarter sessions of the counties of Kent, Middlesex and Surrey responsible for main roads, and also for county bridges, lunatic asylums and other county services. There were at a lower level vestries and bodies of commissioners and trustees with paving and sanitary powers. In all something like three hundred bodies, with a total of some 10,500 members were acting in the Metropolis in the execution of something like 250 statutes.

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[40] Metropolitan Police Courts Act, 1840, s. 6; Justices of the Peace Act, 1949, s. 11; County of London Justices (Jurisdiction) Order, 1953 (S.I., 1953, No. 496).

[41] 10 Geo. II, c. 22.

The Metropolis Management Act, 1855

Some order was brought out of this by the Metropolis Management Act, 1855. The area within which this Act applied is still important as, with minor variations, it is the area which is now the administrative County of London. It might be thought that this would represent what was the built-up town as it existed in 1855; but this is not strictly so. West Ham, for instance, was excluded, and in consequence is now a separate county borough. Again Woolwich was included, though it was then physically separate from the main urban area. The Metropolis as defined in the Act of 1855 was derived from the line of seventeenth and eighteenth century legislation which had applied 'within the Bills of Mortality.' These weekly returns of deaths were started in a time of plague at the end of the sixteenth century. Originally they covered the City and the six contiguous parishes in Middlesex and Surrey. With the expansion of building, the number of parishes included gradually grew. When the Births and Deaths Registration Act, 1836, was passed the Registrar-General in preparing his returns followed the precedents thus set, and the area of the Metropolis defined by the Metropolis Management Act, 1855, was simply the metropolitan district used for the purpose of the Census of 1851.

Within this area, but outside the City of London, the Act constituted as the local authorities, and incorporated the vestries of the twenty-three larger parishes and fifteen district boards of works under which were grouped the smaller parishes. The vestries consisted of the incumbent and churchwardens and a number of vestrymen elected by the ratepayers. The district boards were elected by the vestries of the group of parishes they served. There was some subsequent recasting of the vestries and district boards so that at the end of the century there were twenty-nine vestries and twelve district boards. These vestries and district boards were responsible for paving, lighting, local sewers and sanitary services and to them were transferred the functions of these kinds which were previously in the hands of bodies of commissioners or trustees.

For public works of general metropolitan utility the Act incorporated the Metropolitan Board of Works. This was a body consisting of a chairman and forty-five members who were indirectly elected in varying numbers by the City Corporation, the vestries and the district boards. The Metropolitan Board of Works became responsible for the main drainage of the whole of its area, taking over this function from the former Commissioners of Sewers. It was also charged with major street improvements and with the administration of the London Building Acts. Later it was in addition made responsible for flood prevention,[42] cross river communications (except for the bridges maintained by the City Corporation), parks and open spaces, housing and the London Fire Brigade when, in 1866, it took over the London fire-engine establishment which had been set up by the ten leading fire insurance companies in 1833 who, together with the Treasury, continued (and still continue) to contribute to part of its cost.[43]

The Metropolitan Board of Works is mainly remembered for the extensive public works it carried out—of which the London main drainage system and the Victoria Embankment are outstanding examples—and for the accusations of injudicious management which clouded its end. It worked under the handicaps of being only indirectly elected and of lacking territorial integrity. Thus it rested upon no popular support and it could rely upon no local patriotism.

[42] Thames River (Prevention of Floods) Act, 1879.

[43] Metropolitan Fire Brigade Act, 1865: the Treasury grant will disappear when the Local Government Bill becomes law.

The Local Government Act, 1888

The Local Government Act of 1888 in its application to London sought to remedy these defects. The main object of the Act was to create throughout the country a modern and democratic system of county administration. In its application to the Metropolis the Act had first of all to create a county to which its object could be applied. This it did by converting the area administered by the Metropolitan Board of Works into the administrative county of London for which a county council could be constituted.[44]

Generally the aim of the 1888 Act was threefold. It established new county councils modelled on the town councils under the Municipal Corporations Act of 1882; it transferred to these new bodies the administrative functions of the justices in quarter sessions; but where such complete transfer of functions might be thought to go too far, it provided for their joint control by standing joint committees composed of equal numbers of justices and members of the new county councils. In its application of these principles to London there would inevitably be need for some variations: for instance, as police in an even wider area than the new administrative county of London was not a local government function save for the force maintained by the City, the Standing Joint Committee in London must start without what elsewhere was to be its most important function. The other major variation arose from the need for the new London County Council to supersede that unique authority, the Metropolitan Board of Works.

In the result, the London County Council departed slightly from the normal constitutional pattern of county councils, for example, the number of its aldermen is only one-sixth and not one-third of the number of councillors. But it is mainly in its powers and relations to the second-tier authorities in the administrative county that the London County Council differs from other county councils.

It is as successor to the Metropolitan Board of Works that the London County Council inherited functions suited to the conditions of a wholly urban area which other county councils do not possess.[45] Thus it was made responsible for the main drainage and sewage disposal system: it became a housing authority and responsible for the administration of the London Building Acts, which contain the special scheme for controlling building in London, having its roots in the legislation for rebuilding the City after the Great Fire. For the same reason the London County Council became the authority for carrying out major street improvement schemes, but not, like other county councils, a highway authority.[46]

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[44] Local Government Act, 1888, s. 40.

The City of London, by virtue of having been a separate county, already undertook some county activities and this added a complication to the relations between the new London County Council and the second-tier authorities within the administrative county.[47] The City, for instance, retained its police force and various forms of inspection and licensing which elsewhere vested in the London County Council. So also the City Corporation remained responsible for its bridges, while the London County Council was the authority for other cross-river bridges. The precedent thus formed has been followed in some respects by several later Acts creating new local government services, at any rate so far as to put the City in a somewhat different position from the other second-tier authorities in London.

Apart from the City, the Act of 1888 left untouched the vestries and district boards which in some measure were now subjected to control by the London County Council. Thus the Metropolis Management Amendment Act of 1862[48] had required that the vestries and district boards should obtain the sanction of the Metropolitan Board of Works to raising loans for authorised works. In substance this requirement remained, the sanction of the County Council being necessary until it was abolished by the London Government Act, 1950.

The Local Government Act of 1888 did not, however, complete the process of integration even at county level. After the London County Council had been set up in 1889 two main local services still remained in the hands of other *ad hoc* authorities. The poor law was administered in London by the boards of guardians of the poor established under the Poor Law Amendment Act of 1834. But changes were made in that system. In the Metropolis there were marked differences between, for instance, the East End and the West End, in the amount of poverty and the low rateable value in the one and of affluence and high rateable value in the other. This led to the Metropolitan Poor Act, 1867, which attempted to equalise the burden of the poor rate throughout the area in two main forms. First, the Act established the Metropolitan Common Poor Fund to which the boards of guardians contributed according to their rateable value and from which payments were made to them in proportion to certain of their poor law expenditure.

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[45] ibid.

[46] The metropolitan borough councils are the highway authorities: Metropolis Management Act, 1855, s. 96; London Government Act, 1899, ss. 4 and 6.

[47] Local Government Act, 1888, ss. 40, 41 and 93.

[48] s. 100.

Secondly, the Metropolitan Asylums Board was constituted, composed of members elected by the guardians and appointed by the Central Department. This body maintained a number of poor law institutions—for the mentally deficient, hospitals for infectious diseases and for children's diseases, and casual wards. It also provided an ambulance service.

It was the Local Government Act of 1929, which put an end to the guardians throughout the country, that in London transferred the functions of the twenty-five boards of guardians and of the Metropolitan Asylums Board to the London County Council. To complete the story, it only remains to say that the National Assistance Act, 1948, which finally finished the process of 'breaking up the poor law,' left the County Council with the welfare services in London which that Act leaves in the hands of local authorities.

Measures completing the Integration

The other main service which did not come to the London County Council until some years after 1889 was education. Under the Elementary Education Act, 1870, the London School Board had been established. The Education Act of 1902 in general abolished *ad hoc* education authorities and transferred their powers and duties to the councils of counties and county boroughs. In London the transfer to the County Council took place in 1904 by virtue of the Education (London) Act, 1903, though the County Council had for some years already been providing technical education under the Technical Instruction Act, 1889. The City Corporation still maintains a number of schools: it does so, however, not as a local education authority, but rather as a trustee of certain funds or as controlling expenditure of the City's Cash.

The last step in creating the present system of local authorities in London was the recasting of the second-tier authorities, the vestries and district boards. The Public Health (London) Act, 1891, revised their sanitary powers, and the London Government Act, 1899, reorganised these authorities outside the City. It grouped the areas of the twenty-nine vestries and twelve district boards then existing into twenty-eight metropolitan boroughs, leaving, as a still surviving relic of the older parochial arrangement, the two 'places' of the Inner and Middle Temple. The new metropolitan borough councils were modelled on the town councils of the Municipal Corporations Act, 1882, though with some differences, for example as already mentioned, the number of aldermen. The twenty-eight metropolitan boroughs vary considerably in size: the smallest is some 400 acres in extent with a population of 25,000, while the largest is 9,000 acres with 330,000 inhabitants.

THE PROBLEM OF RECENT EXPANSION

This was the last decisive step in the organisation of local authorities in London. But, with the growth of building far beyond the boundaries of the administrative county of London, history seems to have repeated itself. In earlier centuries the City of London did not expand to cover the town growing around its boundaries, with the results which have been seen. In more modern times the administrative county of London has not been extended to keep pace with the growth of building beyond its boundaries. But again, just as the City Corporation became interested in Southwark, so the interests of the London County Council have inevitably not been stopped entirely by the boundaries of the administrative county. For example, the London main drainage system has followed the dictates of geography and serves an area of some 179 square miles. So, too, much of the Council's housing has had to be built outside the county, and in another direction it has interests under the Green Belt (London and Home Counties) Act, 1938, in encouraging and in financing the preservation of an agricultural and recreational belt around the built-up area of Greater London.

Indeed, the present administrative boundaries within Greater London cannot keep separate each part they define. The technical education provided by the London County Council must necessarily be regional in the service it gives. Again a million people daily enter the administrative county of London and, when their day's work is done, return for the night to their homes outside its boundaries. The administrative arrangements for transport, electricity, water, gas, police and hospitals, though no longer local government services, illustrate the homogeneity of the whole region. Road traffic is now driving this lesson home again.

In 1921 a Royal Commission was appointed

> 'to inquire what, if any, alterations are needed in the local authorities of the administrative County of London and the surrounding districts, with a view to securing greater efficiency and economy and reducing inequalities in the distribution of local burdens.'

When it came to report in 1923 this Ullswater Commission found itself divided, the majority recommending no alteration in structure, save for the establishment of the London and Home Counties Traffic Advisory Committee. The main discussion centred on equalisation of the rate burden within the administrative county of London. The Metropolitan Common Poor Fund naturally ceased to be needed when the poor law was transferred to the London County Council. For the general rate some measure of equalisation had been achieved by the London (Equalisation of Rates) Act, 1894, which has now been replaced by a scheme made under the Local Government Act, 1948.[49]

The last stage in the organisation of local government in London began in 1945. The White Paper on 'Local Government in England and Wales during the period of Reconstruction'[50]—one of the group of policy statements issued by the Coalition Government in anticipation of the ending of the Second World War—declared that a general review of the areas within which local government was administered was needed, since war had necessarily prevented changes which time might have made desirable. But it pointed out that the counties of Middlesex and London presented special problems, though the time was not opportune for considering a special area and special administration for London and Greater London as a whole. Turning, therefore, to the administrative County of London, the central core of the whole built-up area, the White Paper declared that civil defence work carried out by the London local authorities during the war had emphasised

> 'the anomaly of dividing London into no less than twenty-nine separate areas differing enormously in size and population. Moreover, the problems not only of civil defence but of reconstruction have made it clear that a reconsideration of the allocation of functions between the boroughs and the County is overdue.'

Without delay steps were taken to put these policies into effect. A Local Government Boundary Commission was established to review the circumstances of the areas into which the country was divided for the purposes of local government. But it was forbidden to constitute a new county borough of any part of the administrative county of Middlesex and its powers were limited so as not to extend to any part of the administrative county of London.[51]

So much for the general policy: for the particular case of London itself, a Departmental Committee was appointed, also in 1945, under the Chairmanship of Lord Reading

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[49] s. 10.

[50] Cmd. 6579 (1945).

[51] Local Government (Boundary Commission) Act, 1945, ss. 1 and 2.

> 'to review the number, size and boundaries of the Metropolitan Boroughs and the distribution of functions between the London County Council on the one hand and the Common Council of the City of London and the Metropolitan Borough Councils on the other hand.'

Though taken with such business-like promptness, both these steps to apply the principles of the White Paper were to fail. In October, 1946, the Minister of Health announced that it had become clear that the problem with which the Reading Committee was concerned could not be divorced from the many-sided problem of Greater London government, and any investigation of that issue must await settlement of the range of functions, old and new, which were to be entrusted to local authorities. He had accordingly decided to relieve the Committee of the need to continue their investigations.

The Local Government Boundary Commission survived a little longer. In its second report for 1947, however, the Commission made far-reaching proposals affecting not only the areas and status of local authorities, but also their functions. The Government was not willing to accept these proposals and the Boundary Commission was dissolved.[52] Further progress with the general problem of reorganising local government was left to the discussions with the local authority associations which preceded and led to the present Local Government Bill.

The Reading Committee of 1945 was concerned with the position of the metropolitan borough councils and the distribution of functions between them and the County Council. Powers to transfer functions with the consent of the Minister of Housing and Local Government have been contained in various Acts.[53] These powers were used in 1933 and 1934[54] to transfer certain minor functions from the County Council to the metropolitan borough councils. More recently discussions between the councils led to agreement that the County Council should transfer some of its personal health services to the metropolitan borough councils and the Common Council of the City, and should delegate certain functions under the Town and Country Planning Act, 1947, Part III, the London Building Acts and the Shops Acts. Though these latter delegations are likely to go forward, the transfer of personal health services is necessarily postponed now that another Royal Commission has been appointed to consider once more the appropriate system of local government and the distribution of functions among the local authorities which are to administer local services, not only in the administrative county, but throughout the unique conurbation of Greater London.

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[52] Local Government Boundary Commission (Dissolution) Act, 1949.

[53] Local Government Act, 1888, s. 5; Local Government Act, 1929, s. 64; now incorporated in London Government Act, 1939, s. 166.

[54] Transfer of Powers (London) Orders, 1933 and 1934 (S.R. & O., 1933, No. 114, and 1934, No. 523).

7

PUBLIC RIGHTS OF ENTRY

Donovan Waters

No doubt the man in the street would still agree with Dryden that 'Home is the sacred refuge of our life; Secured from all approaches but a wife,'[1] and, of course, this implies everyman's conception of the sacredness of his own property and the uses to which he chooses to put it. Today, however, we have to realise that that romantic picture is not true any longer. In the last century and a quarter the legislature has exposed us to the possibility of all kinds of official persons demanding admittance to our premises, and such legislation has been on an increasing scale in the last twenty-five years. Had Dryden been living at the present time he would have had to admit inspectors from a wide range of public authorities, each inspector having distinct powers to carry into effect his particular purposes.

The question of how far it is wise to create such a wide range of powers of entry is one which must remain within the realms of legislative policy. But, insofar as private property-owning in some large measure remains an agreed enduring feature of our social system, it is the lawyer's task to argue that the private individual should have the maximum opportunity to enjoy and defend his property interests in an age when the State in whatever guise has been given immense powers in order to implement the width of legislative policy.[2]

It will be the object of this paper to argue that we have now reached a stage when we are in danger of losing the hitherto fundamental balance of the interests of private property-owning with the often conflicting interests of a paternally legislating State. One way in which this balance can be maintained is to assess the form of the various public powers of entry on land, and to systematise them as far as possible. This aim directly raises the issue of how far these powers can be reduced to a uniformity of pattern, capable of rapid ascertainment by the property owner, while yet they remain effective in the hands of the central and local authorities.

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[1] Reproduced from *The Oxford Dictionary of Quotations,* 2nd ed. (1954). Rhetoric is even more colourful. 'The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storms may enter, the rain may enter,—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement': William Pitt, Earl of Chatham, *Speech,* on the Excise Bill.

[2] See Lord Denning, *Freedom under the Law* (1949), pp. 107–10.

THE HISTORY OF 'THE ENGLISHMAN'S CASTLE'

The notion of an Englishman's home being his castle is founded on the history of trespass. It has been said of English law, whatever the merits of that view, that the invasion of property rights has always invoked more of the wrath of that law than an invasion upon the person, and certainly even under Saxon feudalism as severe penalties were inflicted upon the trespasser as upon him who assaulted the person. The only significant difference with Norman feudalism was that it cleverly inverted the direction of obligations. That is to say, instead of the freeholder being expected to give services to his superior, those services being commensurate with the extent of his freehold, under the Norman the superior permitted freehold to be enjoyed as long as specific services were rendered. Unlike much of that on the Continent, this system served to perpetuate the hierarchical structure, and with it the peculiar feudal relationship of the individual with land owning. It is a commonplace of learning that with the evolution of estate the particular form of land holding, providing as it did the social measure of a man, gave place to a more simple economic evaluation. The duration of a man's interest in land, and the exclusiveness of his possession became the measure of his significance and influence.

It is probably due in large part to this close feudal relationship of the individual and land holding that we owe the character of the early law of trespass, with its confused criminal and tortious origins. To enter a man's close uninvited is tantamount to an assault upon his person and for early law the intent is sufficiently clear that the act of entry is a breach of the King's Peace. But why should the early law award damages against the person who merely sets an uninvited foot upon another's land? An explanation might be that when the title to land is established by seisin it is clear that the threat of disseisin from the act of entry can best be deterred by the award of damages for any unlicensed entry. The answer, however, may be even simpler. The relationship of an individual with his land and chattels was sufficiently close that an interference with person, land, or chattel was, as it were, an interference with an entity. It is surely not without interest that Roman law, whatever its debatable influence upon the English scene, reveals an even closer relationship. Despite the family cult, the most striking impression is conveyed of the intimate association of the individual and an undivided *dominium*. And in a system which knew of no law of trespass to enter upon a man's land when forbidden to do so constituted *injuria*—insult to the person.

The economic significance of land and its attachment to the individual have therefore created the notion of a unity which defends itself by the law of trespass. And for the purposes both of the civil law and criminal law, it has traditionally followed that a man in his home, like the spider in its web, is at the physical centre of this personal unity. This approach to the premises of a man is reflected in *Semayne's Case* in 1603.[3] The plaintiff, who had previously been held to have a right to property within the defendant's house, brought this action on the case to establish his claim to the property, the defendant having resisted the attempted entry of the sheriffs on the earlier writ. In the course of its judgment the Court of King's Bench had this to say[4]—

> 'That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; . . . but if thieves come to a man's house

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[3] (1603) 5 Co.Rep. 91.

[4] *Ibid.*, at p. 91b. The justification of the finding was that the writs of the real action and of ejectment contained the words *habere facias seisinam* or *possessionem*. Even in these cases the Statute of Westminster I, 3 Ed. I, c. 1, required that the sheriff signified the cause of his coming, and made request that the doors be opened.

> to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing. So it is held every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safety against violence, and the reason of all this is, because *domus sua cuique est tutissimum refugium.*'

The court found that only when a house had been recovered by a real action or writ of ejectment could the sheriff break and enter, and deliver the premises to the claimant. In other cases, even in the face of the sheriff enforcing a civil writ, the defendant in his house enjoyed the privilege of keeping his outer doors shut.

Semayne's Case is important not only because it became an authority for subsequent centuries, but because it reveals the traditional and careful circumscription, which the courts have adopted, of the limited rights to enter land. We are familiar with the rights to fish, to exercise a right of way, to cut turf, and to abate a nuisance, but beyond these and similar restricted rights, themselves in many cases resulting in principle from an original agreement, the law has been jealous to guard the integrity of property, whether the claim to enter has been on civil or criminal grounds.

ENTRY UNDER CIVIL PROCESS

The earliest case recognising the privilege of keeping the outer doors shut in the face of a civil writ is to be found in the Year Books in the reign of Edward IV.[5] In this case an action of trespass succeeded against an officer who broke the outer doors in the execution of a writ of *fieri facias*. Once inside by peaceable entrance the inner doors could be broken, and in 1774 in *Lee* v. *Gansel*[6] Lord Mansfield thought the privilege should indeed be limited in this way. 'The sound maxim of policy is this,' he said, 'that a greater evil should be avoided for a less, and that a less good should give way to a greater.' It was 'long and well understood' that the outer door was not to be broken open by process, for otherwise 'it would leave the family within naked and exposed to thieves and robbers.' But that was as far as he thought the protection should go.

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[5] (1473) Y.B. 13 Ed. IV, fo. 9.
[6] (1774) 1 Carp. 1 at 5.

One might have imagined that, if, as Mansfield claimed, this were the sole rationale of the rule, freedom of entry might by degrees have been extended to civil officers as uniformed police forces became a regular feature during the nineteenth century. This, however, was not the case, and the necessity for a warrant in order to gain entry remains an established fact in English law. In *Harvey* v. *Harvey*[7] Chitty, J., was concerned to differentiate between types of contempt of court simply for the reason that the full vigour of the old rule remained. '[Contempts] are of different kinds,' he said, 'some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest.' The criterion which *Harvey* v. *Harvey* applies is the extent of public interest in the actual process and a writ of attachment for contempt of an order to deliver up deeds and documents of title was the type of situation in which, as Chitty, J., thought, 'the public at large [would] have as much interest as in other criminal process.'[8]

ENTRY UNDER THE CRIMINAL PROCESS

Civil and criminal process each exemplify the traditional attitude that entry on property, that is, forcible entry, is permitted only by exception to the general rule of the sanctity of property, and the rule has been most rigorously applied in relation to the dwelling-house. After centuries of criminal procedure and the lawlessness which preceded the recruiting of nation-wide police forces, right of entry upon land without a magistrate's warrant is still permitted in the exceptional case only. Indeed, the twentieth century public has been alert to prevent any additional incursion by the police without specific authority. One recalls the not inconsiderable disquiet which followed Horridge, J.'s, decision in *Elias* v. *Pasmore* in 1934,[9] a ruling which appeared to condone an extensive right of search by the police acting without a search warrant. In 1929 the Royal Commissioners on Police Powers and Procedure[10] had critically revealed the extent of the practice of search, and, though ultimately nothing was done, their suggestion of legislation did attract considerable Press comment and public correspondence.

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[7] (1884) 26 Ch.D. 644 at 652, quoting Lindley, L.J., in *Re Freston* (1883) 11 Q.B.D. 545 at 556. The writ had to contain the words *non omittas propter aliquam libertatem*. Such writs were those of *capias utlagatum* and *habere facias possessionem* (at p. 655).

[8] *Ibid.*, at p. 649.

At common law the police constable's position is basically one which is shared by the private citizen. This appears clearly in the case of entry without a warrant of arrest. Both citizen and constable have a right of entry to prevent a felony being committed, a right which for the citizen, as *Handcock* v. *Baker*[11] pointed out, does not extend to the restraint of a mere breach of the peace. Both may enter to arrest a suspected felon. In the latter case the citizen may only enter if a felony has actually been committed; the constable is permitted to enter with a mere reasonable suspicion that a felony has been committed. The common law also allows the constable to enter to suppress an affray in a private house and, when an affray has occurred in a constable's presence, to pursue the offender into similar premises. Finally, where a constable without a warrant is about to arrest, he may break into premises if the arrest is being evaded with the connivance of the occupiers or landlords. The same situation of urgency allows the constable to break in and retake a person who has escaped from lawful arrest and is taking refuge in a house. It is worth observing, however, that the common law strictly interprets these rights of entry without warrant. In all cases where pursuit is broken off the police must secure a magistrate's warrant before they can enter premises on a resumed pursuit.

Urgency alone justifies what would otherwise constitute trespass. If a constable possesses a lawful purpose in making his entry, despite the lack of a warrant he does not become a trespasser until consent to his continued presence is refused by the occupier and the constable in turn refuses to leave. At that moment the constable, like any private person, becomes a trespasser *ab initio*.[12] If the constable not only has a lawful purpose in entering, but specific consent is given to his entrance, he may yet refuse to leave if he has reasonable grounds for believing that a breach of the peace might then occur. In a sense, however, this power does not seem far removed from the right of entry to suppress an affray within, and from that point of view *Thomas* v. *Sawkins*[13] seems perfectly logical. Clearly, without a warrant or a lawful purpose which entitles forcible entry or mere entry with consent, the constable is an ordinary trespasser.

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[9] [1934] 2 K.B. 164.
[10] Cmd. 3927, Ch. IV, paras. 120–2.
[11] (1800) 2 B. & P. 260.

It is evident then that the common law has carefully circumscribed those occasions when entry without warrant of arrest is permitted to the criminal process.[14] Criminal statutes have been equally swift to maintain the integrity of property; statutory powers of entry have specifically required the previous issue of a warrant. Even in the case of premises open to the public, where entry is an accustomed feature, nineteenth and early twentieth century statutes have required that the police possess arrest or search warrants.[15] Eleven statutes since 1819 have authorised magistrates to issue search warrants, and these statutes concern serious offences against the moral, physical, or economic safety of the community. Without exception no warrant may be issued unless it contains a specific statement of what building may be searched and on reasonable suspicion of which statutory offence.[16] Only in five statutory cases has the legislature given a constable a right of search on the written authority of his superior officer only.[17] The rationale of these five cases is urgency or the loss of surprise which would otherwise result and defeat the object of entry.

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[12] *Davis* v. *Lisle* [1936] 2 K.B. 434.

[13] [1935] 2 K.B. 249.

[14] Though the police are in no way responsible for the fact that the magistrate has no jurisdiction to issue the warrant, individual police officers are fully responsible for any act which is not authorised by the warrant and can be sued on account of the unauthorised act. Strangely enough the same clarity does not extend to the criminal right of search at common law, entry having been gained. See E. C. S. Wade, 'Police Search' (1934) 50 L.Q.R. 354, and the paras. of the Report of the Royal Commissioners on Police Powers and Procedure, 1929, thereafter reproduced. The law remains as uncertain as it then stood.

[15] See G. Abrahams, *The Law affecting Police and Public* (1938), pp. 147–51.

[16] See Wilshere, *Criminal Procedure* (1954), pp. 15–16.

ENTRY UNDER STATUTORY AUTHORITY

The contrast of the attitude of the criminal law with that of the administrative law is at once striking. How has this occurred? During the second quarter of the nineteenth century statutory authority to enter land began to be extended to a new group of persons. The railway companies were given powers of entry and of compulsory purchase over land in private hands. Such bodies as water boards and gas companies sought and obtained similar rights of entry. Finally by 1845 there was such a wilderness of powers of compulsory acquisition and compensation resulting from a considerable number of private Acts of Parliament that the Land Clauses Consolidation Act was passed. This Act set up a definite set of provisions which could be incorporated with or without specified modifications in subsequent 'Special' Acts authorising compulsory acquisition, and the object was to save considerable trouble and expense. In the years after 1845 rights of entry were bestowed upon private and public corporations for many purposes other than compulsory purchase. It is perhaps a strange comment upon our administrative law that, since that time, apart from the Authorisation of Procedure (Acquisition of Land) Act, 1946, which applied to local authorities and a government ministry, no Act has ever been passed attempting to draw together into one pattern the very extensive and diverse rights over privately owned land which are now possessed by a bewildering number of persons and authorities.[18]

As a result we are not only in danger of losing the balance of property owning and State welfare, but we have already produced an illogical attitude towards the criminal process on the one hand, and the administrative process on the other. The criminal law, with its insistence upon the magistrate's warrant in the great majority of cases of entry, would suggest that property should remain inviolate unless specific authority is given under a single hand. The civil administrative law, its multitude of Acts setting forth social schemes and merely appending a jumble of powers of entry as necessary instruments, would suggest that the right to enjoy property now takes second place to State exigencies.

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[17] Larceny Act, 1916, s. 42; Explosives Act, 1875, s. 73; Official Secrets Act, 1911, s. 9 (2); Metropolitan Police Act, 1839, s. 66 and ss. 46–8; City of London Police Act, 1839, ss. 30–2.

[18] See J. F. Garner, *The Public Control of Land* (1956), esp. at p. 186.

It must now be established to what extent the contrast does exist. To what extent are the statutory powers of entry of public bodies a jumble?

(1) *Who May Enter*

The first question is: what persons may in fact enter? The short answer to this query would be all those persons authorised by the public body in question. Almost every statute conferring powers adopts this language, and, when one reflects that powers are possessed by bodies ranging from government ministries through all forms of local authorities to diverse public utility undertakings, it is at once evident that the property owner or occupier can have no immediate knowledge of the person who requires entry to the premises. So different is the administrative from the criminal function, of course, that this is largely inevitable. Indeed several Acts confer powers of entry upon different persons, and for a range of objects. For example, the Diseases of Animals Act, 1950, gives such rights to ministry and local authority inspectors both for the purpose of locating any diseased or suspectedly diseased animal, and also to ensure that neither the Act nor any order made under it is being broken.[19] In addition, qualified veterinary inspectors may enter to obtain information as to the state of animals, to apply tests, and to take samples.[20] In the case of this Act immediate recognition of local authority inspectors is often possible since chief officers of police are usually appointed, but this practice is restricted to the Diseases of Animals Act. Similarly the Food and Drugs Act, 1955, permits any 'authorised officer' of a local council to enter and ensure compliance with the Act, and an 'authorised officer' includes an officer who secures samples for analysis or bacteriological examination.[21]

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[19] Diseases of Animals Act, 1950, s. 73 (2).
[20] *Ibid.*, s. 6.

However, not only can these public bodies appoint whom they will to fulfil these statutory duties, but in several cases the officer concerned may delegate his powers. Such delegation to any officer of the local authority, though only in those cases where the local authority determines, is a feature of the Sale of Food (Weights and Measures) Act, 1926. It is not clear whether the local authority need only authorise the fact of delegation, or also the particular delegate chosen. Equally, though a 'sampling officer' under the Food and Drugs Act may take samples from an agent or messenger, it has not been settled how far he can delegate his duties.

It seems arguable that all delegations of statutory powers, which include the right to enter, ought only to be possible, except in extraordinary circumstances, with the approval of a specified officer of the public body in question. But, in so far as a wide variety of entering officials is inevitable, it is clear that considerable importance must attach to the document authorising entry.

(2) *The Authorising Document*

No standardisation of such document exists. Indeed no statute, even for its own purposes, appears to set out a common form for entry authorisation. Such phrases as 'duly authorised in writing,' 'authorised by the Minister in that behalf,' 'produce, if required, written evidence of his authority,' and 'produce some duly authenticated document' are typical of the statutory language.

In the first place the statutes are not identical in what they mean by due authorisation. The Public Health Act, 1936, which in many ways became the adopted pattern for some later Acts authorising entry, permits only specific officers of the local authority to sign the document,[22] and this requirement is reproduced in the Water Act,[23] and the Food and Drugs Act, 1955.[24] However, other statutes leave the matter entirely open, and it is neither clear who may authorise, nor to what extent any degree of delegation of the power to authorise is at all restricted. Indeed, Halsbury's Statutes, in relation to the Town and Country Planning Act, 1947, gives this advice to its readers: 'The giving of the authority would appear to be a "ministerial act," which may be delegated to an officer of the planning authority, but planning authorities are advised not to take any risk but to give the authority themselves. In so doing they should state in their resolution the officer by whom the authority in writing may be authenticated.'[25]

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[21] Food and Drugs Act, 1955, s. 100 (1) and s. 91 (1).
[22] Public Health Act, 1936, s. 284.

Secondly, there is a difference as to the contents of the document. Several statutes are silent on the point, but most statutes merely require that the entrant show his right to enter, if he need show any authority at all. However, the Housing Act, 1957,[26] which in this respect reproduces the 1936 Act,[27] goes further in requiring that the document state the particular purpose or purposes for which entry is authorised, though strangely enough this additional information is not required by another major Act of 1936, the Public Health Act. But the complete swing of the pendulum from the Housing Act requirement is produced in the Food and Drugs Act, 1955. Under the latter Act an officer may take any sample, which appears to him to be intended for sale, 'or is found by him on or in any premises . . . which he is authorised to enter for the purposes of the execution of this Act.'[28] The officer need only be authorised to enter for the purposes of the execution. It is neither necessary for this subsection that he should have entered in the exercise of the power, nor illegal if, exercising that power, he fails to comply with the statutory provisions concerning his sampling.

Prior to 1951 it was not at all certain whether a statutory right of entry, with or without an authorising document, gave a right of forcible entry. In that year the Court of Appeal decision in *Grove* v. *Eastern Gas Board*,[29] though specifically concerned with the Gas Act, 1948, gave a clear judicial attitude towards the question. Schedule III, paragraph 34 (1), of that Act gives a right of entry in no way different from numerous other cases, and the Court of Appeal had no real hesitation in finding that such a right did mean a forcible right. 'Otherwise,' said Somervell, L.J., 'the paragraph would not be needed if the owner or lessee consented.'[30] The response to this decision was a Private Member's Bill which subsequently was passed as the Rights of Entry (Gas and Electricity Boards) Act, 1954, and under this Act the occupier is entitled to refuse entry to officers of those Boards unless entry is for an emergency or the officer possesses a magistrate's warrant. In 1954 it might have been possible to suggest that such an authority from such a source was unsuited to the processes of administrative law, but already there was precedent to the opposite effect. In 1878 under the Weights and Measures Act[31] inspectors of local authorities were only entitled to enter in possession of a magistrate's warrant. The courts interpreted this Act to permit the issue to an inspector of a general warrant which covered a series of entries,[32] but even this practice was not adopted in subsequent legislation. The Public Health Act, 1936, requires that local officers acting under this legislation shall only enter by force if they possess warrants covering each entry. Even in the four exceptional circumstances, for example, where application to enter would destroy the object of entry, the Act specified that the entry must be on reasonable grounds, and the occupier be notified of the intention to secure a warrant.[33] The 1954 Act, therefore, was merely making similar provisions apply to the entry of gas and electricity authorities.

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[23] Water Act, 1945, s. 55.

[24] Food and Drugs Act, 1955, s. 131 (1) and Part I of Ninth Schedule, incorporating s. 284 of the Public Health Act, 1936.

[25] Halsbury, *Statutes of England,* 2nd ed., Vol. 25, p. 622.

[26] Housing Act, 1957, s. 159.

[27] Housing Act, 1936, s. 157.

[28] Food and Drugs Act, 1955, s. 91 (3).

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[29] [1951] 2 All E.R. 1051.

[30] *Ibid.*, at p. 1053.

[31] Weights and Measures Act, 1878, s. 48. See also *Creasy* v. *Hosking*, *The Times*, July 31, 1953.

[32] *Hutchings* v. *Reeves* (1842) 9 M. & W. 747.

[33] Public Health Act, 1936, s. 287 (2). The Water Act, 1945, s. 48, and the Food and Drugs Act, 1955, s. 100 (2), similarly call for warrants in the case of the refusal to admit to premises.

Grove v. *Eastern Gas Board* raises another point; whether a forcible right of entry is permitted by those statutes which under no circumstances specify the need for a warrant. Clearly where the statute in question carries words similar to those of the Gas Act, 1948, *Grove's* case would strongly suggest that the mere right of entry is one of forcible entry. From the point of view of the public body wishing to enter, this means that the warrant, where statutorily required, is in any event superfluous. But in the case of those statutes making no mention of warrants the public authority may have its own problems. In *Grove's* case Somervell, L.J., thought it arguable that where a statutory clause gave a right of entry followed by words imposing a penalty for obstruction, such penalty was the only course which could be applied if entry was refused. He considered that a succeeding clause, giving another power of entry and awarding compensation for damage to the occupier, might confirm that only the second right of entry was forcible.[34] With this view, Jenkins, L.J., agreed.[35] Their Lordships were discussing an Act which on that matter is now repealed, but a similar argument might be advanced in regard to statutes still in force. For example, the Heating Appliances (Fireguards) Act, 1952, gives a right of entry to officers of the local authority under section 2 (1). Subsection (2) makes wilful obstruction an offence. Could it therefore be argued that this right of entry is not of forcible entry? Perhaps with difficulty, but the doubt remains.

All this seems to confirm that, even where written authority must be shown, the occupier has little means of recognising the validity of that authority, since no uniformity of document exists. Moreover, he has no ready means of knowing which would-be entrants he may resist in favour of a magistrate's warrant, since there is no uniform requirement for a warrant even in cases of entry for similar purposes, for example, inspection. Where the occupier is away, *Grove's* case established that this situation is not to deter the official from entering. It is difficult to find any justification for this lack of consistency.

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[34] [1951] 2 All E.R. 1051 at 1054, 1055.

[35] *Ibid.*, at p. 1057.

(3) *Notice of Intended Entry*

Another area in which diversity exists is the length of notice of intended entry. This can vary from twenty-four hours to fourteen days, and, though a large number of Acts, including the Rights of Entry (Gas and Electricity Boards) Act, 1954,[36] have adopted since 1936 the twenty-four hours' notice of the Public Health Act,[37] omissions from this practice do not appear to be exceptions to any principle. In *Grove's* case Jenkins, L.J., was of the opinion that no notice was required under the particular provision of the Gas Act, 1948, because no work which might raise questions of ownership or conflicting interests was to be done upon the premises.[38] This may well explain why Acts concerned with compulsory purchase usually require longer periods, anything from three to fourteen days. But a power of entry to survey under the Land Clauses Act, 1845, requires not less than three days' notice, while under the Town and Country Planning Act, 1947, the Agriculture Act, 1947, and the Mineral Workings Act, 1951 (all involving compulsory taking over of land) the same power may be exercised with twenty-four hours' notice.[39] The National Parks and Access to the Countryside Act, 1949, permits survey on seven days' notice,[40] and this same period is adopted for all purposes by the Civil Aviation Act, 1949. Now it is true that those Acts which require no notice to be given are purely concerned with inspection, for example, to locate diseased animals, inadequate heating appliances, suspected water wastage, and defectiveness in public works already situated on private land, but it surely all depends on what one means by conflicting interests as to whether many of these cases ought also to receive notice. Certainly, even in relation to surveying, land owners and occupiers are dissatisfied with the value of twenty-four hours' notice. This became clear during the committee proceedings in the House of

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[36] Rights of Entry (Gas and Electricity Boards) Act, 1954, s. 2 (2).

[37] Public Health Act, 1936, s. 287 (1). The courts have strictly interpreted the requirement of twenty-four hours' notice; see *Stroud* v. *Bradbury* [1952] 2 All E.R. 76.

[38] [1951] 2 All E.R. 1051 at 1056.

[39] Land Clauses Consolidation Act, 1845, s. 84; Town and Country Planning Act, 1947, s. 103 (4); Agriculture Act, 1947, s. 106 (1); Mineral Workings Act, 1951, s. 37 (1).

[40] National Parks and Access to the Countryside Act, 1949, s. 108 (3).

Commons of the Electricity Act, 1957. It appeared from the Paymaster-General's comments that, despite the lack of any authority, representatives of the Electricity Boards had been entering land without warning, and from the objections of several Members of Parliament that farmers would like to see powers of this sort exercised 'with rather more consideration and consultation.'[41] The Government's proposal of twenty-four hours' notice before entry for surveying was passed, but the Government, taking up the suggestion of the Conservative opposition, subsequently adopted a notice period of twenty-eight days![42] Two thoughts follow from this figure. First, it now takes the electricity boards a longer time to get onto the land for the simple process of surveying than it takes any other body for any process concerned with compulsory purchase. Secondly, accepting the previous minimum and generally adopted twenty-four hours' and maximum seven days' notice, this twenty-eight days' notice carries a distinct suggestion that either the legislature has been over indulgent to administrative demands during the last twenty years, or else this Act unfairly hampers the electricity boards. Either position seems unsatisfactory, and calls for an overhaul of the entire question.

(4) *Notification of Entry*

To all those who have an interest in land, it is also of importance to know who must be notified of intended entry. Most Acts, if they refer to the matter at all, are content with notice to the occupier only. For inspection purposes this is probably reasonable, for surveying purposes when schemes for work upon the land are in the offing it is much less reasonable (some Acts reflect this view),[43] and for compulsory purchase purposes it is surely most unreasonable. Again, however, there is no uniformity. The Diseases of Animals Act, 1950, which requires no notice to be given of any intended entry, would

[41] *The Times*, March 15, 1957. For the complete debate see March 14, 1957, *Parl. Deb., Official Report*, House of Commons, Standing Committee D, cols. 556–600.

[42] Electricity Act, 1957, s. 35 (2).

[43] *E.g.*, Housing Act, 1936, s. 157, now replaced by Housing Act, 1957, s. 159.

appear to offer alleviation in the fact that owner, occupier, or person in charge of the land may each ask for written reasons for entry.[44] The Food and Drugs Act, 1955, on the other hand, equally concerned with inspection and sampling, contents itself with notice to the occupier only.[45] The Rights of Entry Act, 1954, permits consent to entry by electricity or gas authorities to be given 'by or on behalf of the occupier.'[46]

In relation to compulsory purchase notice to all interested parties would be particularly important, but, apart from the 1845 Land Clauses Consolidation Act, in all other Acts notice would seem to be adequate when given to the person on the land only, or one of a specified list of persons having an interest in the land. This construction appears from the fact that the 1845 Act permits promoters of undertakings, prior to paying full compensation, to enter land only with the consent of owners *and* occupiers. Entry to survey or bore upon the land, however, merely requires notice to the owners *or* occupiers.[47] It is in this light, therefore, that the 1946 Act must be read, empowering local authorities and the Ministry of Transport to acquire compulsorily. This permits notice to the owner, lessee, *or* occupier.[48] Subsequent Acts (Agriculture, Town and Country Planning, Mineral Workings, and Electricity) have required notice to the occupier only.[49] Is this position satisfactory, or, indeed, necessary? Again, in the committee stage of the Commons consideration of the Electricity Act, 1957, the Paymaster-General said[50] that he was prepared to impress upon the electricity authorities that they should, in every case where the owner was readily identifiable, serve him with notice, simultaneously with the occupier. Now it is hardly likely that landowners reserve their wrath for the electricity and gas boards, and if, as the Minister suggested, 'a great deal of the difficulty in these matters arises from inadequate public relations,' would it not assist those relations if it became a statutory obligation in all cases of compulsory purchase to give notice to both occupier and owner, where the latter is readily identifiable?

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[44] Diseases of Animals Act, 1950, s. 73 (4). Should the owner be distinct from the occupier or person in charge of the land, it is not clear whether on request the inspector is obligated to supply written reasons to both parties.

[45] Food and Drugs Act, 1955, s. 100 (1).

[46] Rights of Entry (Gas and Electricity Boards) Act, 1954, s. 1 (1).

[47] Land Clauses Consolidation Act, 1845, s. 84.

[48] Acquisition of Land (Authorisation Procedure) Act, 1946, Second Schedule, Part I, para. 3 (1).

[49] Agriculture Act, 1947, s. 106 (1); Town and Country Planning Act, 1947, s. 103 (4); Mineral Workings Act, 1951, s. 37 (1); Electricity Act, 1957, s. 35 (2).

[50] March 14, 1957: *Parl. Deb., Official Report,* House of Commons, Standing Committee D, col. 591. For a case of land acquisition by a local authority where notice was given to lessees only, see correspondence in *The Times,* October 2, 1957.

(5) *Compensation for Entry*

For what items should the interested parties (again most Acts restrict this to the occupier) receive compensation for the results of entry? Actual damage caused, or damage plus disturbance in the enjoyment of land? On this question legislative attitude has again been erratic. Where inspection alone is involved no compensation of any sort is given, but where surveying or other work is in point compensation is given, but for different items. Prior to 1951 no Act awarded compensation for any thing other than actual damage. However, in the Mineral Workings Act of that year disturbance was added as an additional head, and the Government included the same item in the Electricity Act, 1957.[51] The Paymaster-General considered this as 'much wider' than the sole right to damage compensation under the Town and Country Planning Act, 1947, which had otherwise been adopted as a precedent.[52] But, if it can be given in one case of entry to survey, it is surely a right which should be extended to all other cases of entry to carry out work on the land.

THE NEED FOR STATUTORY REFORM

It is evident that on the whole the legislature has been much more lax in dealing with the right of the administrative process to enter private property than with the criminal process. It is often said that today we are all criminals, and it is not unreasonable to argue at a time when the arm of the criminal law touches the life of the most respected citizens that such a difference of attitude towards private property is somewhat absurd. But, even if the implications of criminal entry are more far-reaching in the eyes of the man in the street than any civil entry, the rules of both laws are traceable to a common parent—the sanctity of private property. How far, commensurate with the needs of the administrative process, can the legislature still recognise this principle?

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[51] Mineral Workings Act, 1951, s. 37 (2); Electricity Act, 1957, s. 35 (3).

[52] March 14, 1957: *Parl. Deb., Official Report,* House of Commons, Standing Committee D, col. 558.

It is fair to say that the legislature has never fully considered this problem. The pressure on Parliamentary time and the fact that this subject constitutes but part of the obverse side of broad legislative policy no doubt account for this inattention. It is true that in the last ten years the Liberal Party has introduced in the House of Lords two similar Bills and a Resolution designed to remedy this problem,[53] each Bill and the Resolution listing a number of features of the administrative process which allegedly restricted the liberties of the individual. But each did little more than list the restrictions, and certainly nothing sufficiently analytical appeared on statutory rights of entry. In the resultant debates Governments of both major parties roundly stated the need for such rights, supporters of the Bills and Resolution primarily concerned themselves with powers under remaining wartime regulations, and with a renewed Governmental reminder of the width of the problem each Bill and the Resolution in turn were withdrawn. A further Liberal Bill, one of whose clauses concerns the right of entry to search for and remove objects and documents, was introduced into the House of Lords on June 4, 1957, to be debated next session.[54]

Something more specific, complex, and comprehensive is needed from the legislature. Even with the present demands for administrative convenience, it is evident that there could be a uniform pattern of powers of entry. The Rights of Entry (Gas and Electricity Boards) Act, 1954, is something on the right lines, but, as a Private Member's Bill, it was highly localised in the public bodies it affected, and itself created more anomalies elsewhere.

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[53] See especially the Second Readings of the Bills and the debate on the Resolution in the House of Lords (May 15, 1947: *Parl. Deb., Official Report*, House of Lords, Vol. 147, cols. 762–810; June 27, 1950: *ibid.*, Vol. 167, cols. 1041–1110; July 16, 1952: *ibid.*, Vol. 177, cols. 1168–1242).

[54] Liberties of the Subject Bill (H.L.) (115), Clause 12. See also Clause 11 (3) and Explanatory Memorandum.

Marshalling the present jumble of statutory machinery into a pattern must also have the effect of concentrating legislative and public attention upon two things. First, the extent to which we, as a community, wish to confer these very significant rights upon various bodies. At the annual conference in Easter, 1957, the President of the Education Welfare Officers' National Association had this to say. Much more could be gained in preventing truancy if school attendance officers were given right of entry into the home.[55] Do we wish to see this sort of thing? Secondly, there being a pattern of machinery for the exercise of such rights, the extent to which exceptions are really needed. Should the compulsory purchaser never need a magistrate's warrant to gain entry? Should all the powers of an inspector under the Diseases of Animals Act be exercisable without the necessity for some prior notice? Dryden's conception of privacy may be romantically expressed, but the implications are real and immense. If legislation were our aim, its achievement would be by no means a lean benefit to the structure of our society.[56]

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[55] *The Times,* April 22, 1957.

[56] The recently published Land Powers (Defence) Bill completely revises the powers of the military authorities in the use of land for manoeuvres. Extensive rights of entry are granted, but the preliminary procedures of the Bill have been drafted 'in the spirit of the Franks Report' (The Secretary of State for War, Mr. Christopher Soames).

Nevertheless, the general power to enter and survey in furtherance of any of the Bill's purposes exhibits the same shortcomings as those in the statutes discussed. In this respect the Bill merely adds to the jumble.

See clause 21 and the Third Schedule; also the Financial Memorandum, especially para. 9. See further the debate on the Second Reading, *Parl. Deb., Official Report,* House of Commons, February 10, 1958, Vol. 582, cols. 36–108.

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PERSONAL LIBERTY IN THE COMMONWEALTH

DENYS C. HOLLAND

LET me begin by defining my terms. In considering the meaning of personal liberty I cannot do better than quote from Lord Denning who in *Freedom under the Law,* defines personal liberty as 'the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons.'[1] 'Despite all the great changes that have come about in the other freedoms,' he continues, 'this freedom has in our country remained intact.'[2] With this view of personal liberty in England one may contrast the opinions expressed by Sir Alan Herbert who states, 'It cannot be too clearly insisted that this is not a free country and it will be an evil day for the legal profession when it is. The citizens of London must realise that there is almost nothing they are allowed to do. Prima facie all actions are illegal, if not by Act of Parliament, by order in Council; and if not by order in Council by departmental or police regulations or by-laws. They may not eat where they like, drink where they like, walk where they like, drive where they like, sing where they like, or sleep where they like.'[3] Sir Alan Herbert's views, although an exaggeration, underline the important fact that liberty in this country depends to a great extent not on the strict letter of the law but upon the existence of a reasonable-minded police force and a reasonable jury. Indeed Lord Denning himself makes the same point when he states that 'it is just as important that the police should be honest and fair in all their dealings as that judges should be'[4] and 'even when the judges are independent they may not always see clearly on a question of freedom . . . because of their own predilections on the matter in hand. This is where the value of a jury is most clearly seen.'[5]

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[1] Sir Alfred Denning, *Freedom Under the Law* (1949), p. 5.

[2] *ibid.*

[3] A. P. Herbert, *Uncommon Law* (3rd ed. 1937), p. 28.

[4] *loc. cit.,* at p. 26.

Personal liberty in this country is not, however, my concern in this paper, which will deal only with those parts of the Commonwealth other than England. Nor indeed am I concerned with personal liberty in the wide sense attributed to it in the quotation from Lord Denning given above. In that broad sense personal liberty includes not merely freedom from physical restriction, but also freedom of speech, freedom of religion, freedom of mind, and other freedoms. In fact, despite his broad definition of personal liberty, Lord Denning in *Freedom under the Law* deals only with freedom from physical restriction in considering personal liberty. I propose to do likewise here. By what means is personal liberty protected in this country? Do the same means exist in other parts of the Commonwealth?

THE WRIT OF HABEAS CORPUS

The importance of the writ of habeas corpus as a means of protecting personal liberty is too well known to need stressing. Whenever any person is detained in this country otherwise than by sentence of the courts, he may apply to any judge of the High Court for a writ of habeas corpus in order to determine whether the detention is illegal or else to secure a speedy trial. There are, of course, many countries within the Commonwealth where a similar writ of habeas corpus is available from the local courts. Thus, for example, in Singapore the writ of habeas corpus can be issued by the High Court.[6] Where such a writ can be issued by the local courts, the High Court in England is deprived of its authority in this matter by the Habeas Corpus Act of 1862. This Act provides 'no writ of habeas corpus shall issue out of England, by authority of any judge or court of justice therein, into any Colony or foreign Dominion of the Crown where Her Majesty has a lawfully established court, or courts of justice, having authority to grant and issue the said writ and to ensure the due execution thereof throughout such Colony or Dominion.'[7] The provisions of this Act obviously cause no hardship if they are limited to cases where the local colonial court has a duty to issue a writ of habeas corpus. It obviously matters little whether the writ is issued by the local court or by the High Court in England. However, there are several dependent territories of the Crown where although a writ of habeas corpus is not capable of issue by the High Court as of right, there are provisions enabling the local court in its discretion to issue directions in the nature of habeas corpus. A typical example of such a provision is provided by section 330 of the Aden Criminal Procedure Code which under the heading 'Directions in the Nature of Habeas Corpus' provides that 'the Supreme Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public or private custody be set at liberty.'[8] This power is apparently completely discretionary and if its existence ousts the power of the High Court in England to issue the writ of habeas corpus then obviously personal liberty in those territories is not so well protected as in England, where under the provisions of the Habeas Corpus Act, 1679, a judge who unlawfully refuses to issue a writ is liable to a penalty of £500.[9] In England, too, successive applications for the writ can be made to every High Court judge in case of refusal, although generally no appeal lies against the grant of the writ. In connection with this, Lord Denning stresses the equal importance of the corresponding rule concerning appeals against conviction or acquittal. He points out that 'whenever a man is found not guilty of an offence with which he has been charged, there is no appeal open to the prosecution who think him guilty.'[10] This is of course subject to the minor exception concerning appeals by way of case stated. Unhappily perhaps this general prohibition on appeals against acquittal does not exist in all dependent territories. In Aden, for example, section 289 of the Criminal Procedure Code provides that 'the Attorney General or any person authorised by him may present an appeal to the Supreme Court from an order of acquittal passed by any court other than the Supreme Court.' Similar provisions with slight variations exist in many other territories. In Brunei, for example, section 275 of the Criminal Procedure Code provides that an appeal against acquittal may be brought by, or with the written sanction of, the Public Prosecutor. And in Cyprus, section 129 of the Criminal Procedure Law provides that no appeal from acquittal can be brought except at the instance of, or with the written sanction of, the Attorney-General. There is, thus, the danger of a man being twice put in jeopardy on the same charge.

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[5] *loc. cit.*, at p. 39.

[6] For an example of an application to the Singapore High Court for a writ of habeas corpus, see *The Times*, October 25, 1957.

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[7] s. 1.

[8] For a further example, see the Brunei Criminal Procedure Code, s. 341.

[9] s. 9.

[10] *loc. cit.*, at p. 8, footnote 8.

Habeas corpus is important in England not only as a means of securing release from unlawful detention, but also as a means of securing that a person lawfully arrested on a criminal charge is not kept in prison for an undue length of time awaiting trial. Thus, for example, a person lawfully arrested by the police must be brought before a magistrate within twenty-four hours and may then be granted bail pending trial. If bail is refused by the magistrate, an appeal lies to the High Court. In these respects the person residing in a dependent territory appears to be as well protected as a person resident in England. Most colonial territories have provisions in their criminal codes similar to those mentioned above. Thus the Aden Criminal Procedure Code provides that arrests must be reported to a magistrate, and that nobody is to be detained for more than twenty-four hours without special order of a magistrate.[11] So, too, in the Cyprus Criminal Procedure Law one finds the rule that nobody is to be detained for more than twenty-four hours on the authority of the police alone[12] and so, too, in many other colonial criminal codes. Similarly in many colonial criminal codes there is a provision that if a private person makes an arrest he must without unnecessary delay take the person arrested before a police officer or to a police station.[13] Such a provision corresponds with the rule laid down in this country by the House of Lords in *John Lewis* v. *Tims*.[14]

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[11] s. 39.

[12] s. 17.

[13] See, for example, the Aden Criminal Procedure Code and the Cyprus Criminal Procedure Law.

[14] [1952] A.C. 676.

DETAINING THE FIFTH COLUMN

Although in normal times nobody may be detained except by judgment of the courts, obviously an exception to this rule must be made in times of grave emergency. So in England during the last war Defence Regulation 18B empowered the Secretary of State to detain any person he had reasonable cause to believe was of hostile origin, or hostile associations, and in the well-known case of *Liversidge* v. *Anderson*[15] the House of Lords held that this power of the Secretary of State could not be reviewed by the ordinary courts. Lord Denning has stressed that 'this wartime exception must not be allowed to be introduced into this country in time of peace, or at all events only in the gravest emergency.'[16] Differences of opinion over the necessity for such arbitrary powers of detention are bound to arise, however, once this exception is admitted. In many dependent territories such powers of arbitrary detention without trial and without review in the ordinary courts do exist and whether one regards them as justifiable or not must depend upon the view which one takes of the political situation. Most of the cases where powers of detention without trial are enjoyed are by now familiar to everybody as a result of Parliamentary questions and Press publicity. Nonetheless it may be useful to draw attention to some of those provisions here. In Cyprus powers of detention without trial are conferred by the Detention of Persons Law, 1955, which provides as follows—

Section 2. If the Governor is satisfied that any person is or has been a member of, or is or has been active in the furtherance of the purposes of, an organisation which he is satisfied has been responsible for any acts of violence directed to the overthrow by force or violence of the Government or the destruction of or damage to property of the Crown, and by reason thereof it is necessary to exercise control over such person, the Governor may, subject to the provisions of this law, make an order against such person directing that he be detained in such place and under such conditions as the Governor may direct. Section 3 provides that the detention order may be suspended subject to the imposition of conditions as to residence, employment, movements, and similar matters. Section 4 provides for the establishment of an advisory committee or committees consisting of persons appointed by the Governor to which a person detained can appeal. Similar provision for advisory committees existed of course in this country when Defence Regulation 18B was in force, but the inadequacy of this as contrasted to an appeal to the ordinary courts as a means of protecting the individual needs no emphasis.

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[15] [1942] A.C. 206.
[16] *loc. cit.*, at p. 12.

In Kenya, too, as everybody knows, similar provisions are in force and many thousands are still in custody in detention camps without having received any trial or having any charge laid against them. In Singapore, powers of arbitrary detention are conferred by the Preservation of Public Security Ordinance, 1955, the main provisions of which are as follows—

Section 3. If the Governor-General is satisfied with respect to any person that with a view to preventing that person from acting in a manner prejudicial to the security of Malaya or the maintenance of public order therein or the maintenance therein of essential services it is necessary so to do, the Chief Secretary shall by order under his hand make an order directing that such person be detained for any period not exceeding two years. As an alternative to a detention order the Chief Secretary may impose restrictions as to residence, movements and similar matters. Under section 5 the person against whom an order is made under this law may appeal to a special appeals tribunal. Powers are also given to police officers by section 17 of this ordinance which provides that any police officer may without a warrant arrest and detain, pending inquiries, any person in respect of whom he has reason to believe there are grounds justifying a detention order and who has acted or is about or is likely to act in a manner prejudicial to public safety or the maintenance of public order. Under section 19 of the Ordinance the Commissioner of Police is given power to order a curfew, but this is subject to the safeguard of confirmation by the Governor in Council within forty-eight hours. It should perhaps be added that provisions for a curfew also exist of course in Cyprus, although there they are contained in a separate law, the Curfews

Law of 1955, which provides that 'the Governor may if he deems it expedient so to do in the interests of public safety and the maintenance of public order at any time by order direct that no person in any area specified in the order shall be out of doors between such hours as may be prescribed by the order except under the authority of a written permit granted by such person as may be specified in the order.'[17] The penalty for infringement of this provision is imprisonment for a term not exceeding one year or a fine not exceeding £100, or both.[18]

In view of the existence of such arbitrary powers of detention in this country during wartime and in several dependent territories at the present time on the grounds of emergency, it is perhaps a little surprising that the Press in this country has expressed such concern, indeed almost horror, that Mr. Edusei, the Ghana Minister of the Interior, having learnt the lessons we have taught, has sought similar powers in the now independent territory of Ghana. On October 3, 1957, in a speech in Accra, Mr. Edusei stated that a special local deportation and detention bill would be introduced in order to make it possible to arrest and detain those who criticise the government.[19] In the result a much more moderate Emergency Powers Act was passed to enable the government to declare a local or general emergency and thereafter to remove and restrict the residence of persons. Such powers may well be deplored but in view of the violence and disorder, which is known to have prevailed in Ghana for some years now, they may well be necessary. It ill becomes us who have sought or permitted similar powers in our own territories in such conditions to condemn too readily an independent member of the Commonwealth whose Government decides that such powers are necessary in its territory.

DEPORTATION, RUSTICATION AND RESTRICTIONS ON IMMIGRATION

Closely connected with the question of detention without trial are the questions of deportation, rustication and restriction of immigration. These matters are not mentioned by Lord Denning in dealing with personal liberty in his book *Freedom under the Law,* presumably because in this country there is no power to deport or rusticate a British subject or to prevent the entry to this country of a British subject. However, such powers certainly exist in many dependent territories and their use recently in Ghana has given rise to a good deal of hostile criticism from the press. In 1957 a Deportation Act was passed in Ghana, the main provisions of which are as follows—

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[17] s. 2.

[18] s. 3.

[19] *The Times*, October 4, 1957.

Section 3. (1) No citizen of Ghana shall be liable to deportation under this Act.

(2) For the purposes of this Act the burden of proof that he is a citizen of Ghana shall lie upon the person who asserts that he is such a citizen.

Section 4. Subject to the provisions of this Act any person is liable to deportation who . . . (c) has been declared by the Governor-General to be a person whose presence in Ghana is not conducive to the public good.

Section 5 provides that a deportation order may include the dependants of the deportee if the Governor-General so directs.

Section 6 enables the Minister to use the deportees' money or property to pay fares and to maintain the deportee and his dependants until their departure.

This law was not entirely novel: it repealed and replaced the Aliens Ordinance and the Immigrant (British Subjects) Deportation Ordinance, and indeed similar provisions for deporting immigrant British subjects as well as aliens exist in many dependent territories. For example, the Brunei Banishment Enactment provides that whenever it appears to the Resident on the written information of the chief police officer that there is reasonable cause for believing that the banishment from the State of any person is necessary for the safety, peace or welfare of the State, the Resident may, if he thinks fit, after examining the person, make a report to the Sultan in Council who may then order the banishment of such person from the State for life or for some shorter period. It will be observed that this law is not even confined to non-citizens; it extends to any person. In Singapore the Deportation (British Subjects) Ordinance of 1952 enables the Governor in Council if he thinks fit to make a deportation order in respect of any immigrant British subject who does not belong to the colony and who is . . . (b) an undesirable person.[20] An undesirable person is defined in the Ordinance as a person who is or has been conducting himself so as to be dangerous to peace, order, good government, or public morals.[21] As in the case of Ghana, the burden of proof that the person charged belongs to the colony lies upon the person so alleging.[22] The power to banish non-British subjects in Singapore is conferred by the Banishment Ordinance which provides that if the Chief Secretary thinks that banishment would be conducive to the public good, he may lay the report before the Governor in Council who may then make a banishment order.

In view of these similar provisions in other British territories it is perhaps surprising that the Ghana deportation law has aroused criticism. The publicity over the Ghana deportation laws came about as a result of the attempt of the Ghana government last year to deport two Muslim leaders, Alhaji Amadu Baba, and Alhaji Alufa Othman Larden Lalemie. It was on July 30 that the Ghana government ordered the deportation of these two, who the next day sought a declaration from the court that they were Ghanaians and as such could not be deported under the provisions of the Deportation Act. Whilst these proceedings were still before the court and despite an undertaking given by the Ghana Attorney-General that meanwhile they would not be deported, the Ghana legislature passed a special Deportation Act which enabled the Minister to deport the two Alhajis and provided that any proceedings in court should be automatically determined and the deportation order made under the special Act should not be subject to review in any court. This special Act came into force on August 23 and the two persons concerned were deported the same day.

This law, No. 19 of 1957, entitled The Deportation (Othman Larden and Amadu Baba) Act, 1957, in addition to the provisions above outlined provided that the master of a vessel or the commander of an aircraft in Ghana shall, where required by the Minister or by an officer of police not below the rank of Assistant Superintendent, receive the two deportees or either of them on board the vessel or aircraft and afford them or him proper accommodation and maintenance on the voyage from Ghana.[23]

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[20] s. 3.
[21] s. 2.
[22] s. 16.

The existence of powers to deport citizens of the deporting State does obviously raise a practical problem, namely, to which country are they to be deported. A non-citizen will obviously be deported to his own country. In this particular instance Nigeria received the two Alhajis, but obviously if the deportees were in fact citizens of Ghana as they claimed, no country could have been compelled to receive them and if no country in fact did prove willing to accept them voluntarily, then presumably deportation would have involved them in travelling the high seas until death released them. No problem is likely to arise in the future in Ghana in this connection since this Act did not confer power to deport citizens of Ghana generally but was directed only at the two Alhajis.

Further criticism of the approach of the Ghana Government on questions of personal liberty was aroused when a journalist employed by the *Daily Telegraph,* Mr. Ian Colvin, was charged with contempt of court for his comments on the proceedings against the two Alhajis. The proceedings were unsuccessful on the technical ground that they had been brought in the wrong court. Subsequently Mr. Christopher Shawcross, who had been defending Mr. Colvin, left Ghana for Nigeria; and when he sought to re-enter Ghana, in order to defend Mr. Colvin on a further charge of writing with intent to incite public prejudice, the Ghana government exercised its powers to prohibit re-entry. Again while this may be considered an extremely undesirable attempt to interfere with the right of a person to proper legal representation of his own choice, it is necessary to remind ourselves that we also have been guilty of similar conduct in dependent territories in the not-too-distant past. Discretionary power to restrict the entry of non-citizens into dependent territories is quite general. Thus, for example, in Kenya the Immigration Ordinance of 1956 provides that the principal immigration officer, with the confirmation of the Governor in Council of Ministers, may declare any non-African, who is not the holder of a residence certificate or is not entitled to such a certificate, to be a prohibited immigrant.[24] An African is narrowly defined as a person who is a member of an African tribe indigenous to Kenya, Tanganyika, Uganda or Zanzibar or a Swahili, but does not include a Somali.[25] It may be argued that although such powers exist in dependent territories they have not been used as they have in Ghana to prevent a person accused of crime from employing counsel of his own choice. This, however, is not so. As recently as 1952 at the trial of Jomo Kenyatta the Kenya Government declared some of the counsel who wished to appear on behalf of Jomo Kenyatta to be prohibited immigrants. Two or three lawyers volunteered to come from the Sudan but were told they would not be admitted; one or two did come from Ghana, but on their arrival at Nairobi were told they could not be allowed entry; an Indian lawyer named Sethi was allowed entry but only on the condition that he did not go anywhere near the court. The argument used by the Kenya Government was that they were not satisfied that Jomo Kenyatta wanted the services of these counsel. There is therefore a precedent in our own territories for the course of conduct adopted by the Ghana Government in relation to Mr. Christopher Shawcross. This is not to say that the conduct of the Ghana Government is morally or politically justifiable but it is suggested that if, as perhaps we should, we are to criticise such activities on the part of an independent government, we should at the same time take steps to put our own house in order.

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[23] s. 6.

In parenthesis, it may be noted that Jomo Kenyatta was not only convicted of the offence with which he was charged, namely managing Mau Mau, but subsequent to his conviction an order was made to restrict his movements when his term of imprisonment is completed. In addition a retrospective law, namely

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[24] s. 7.

[25] s. 2 (1).

The Forfeiture of Lands Ordinance of 1953, was passed providing that persons convicted after October 20, 1952, of offences like that of which Jomo Kenyatta was convicted should be liable to forfeiture of their lands. Such an order was then made in respect of Jomo Kenyatta.

Not only is it suggested that we should not condemn the Ghana Government for its restrictions on personal liberty without at the same time indulging in a little self-criticism, but also we should not pretend to be surprised, although we may be distressed, by what is taking place there. Not only was violence rife in Ashanti for some considerable time before independence was granted, but also the Prime Minister of Ghana has himself given ample warning of his own views on these matters. The most recent example of Mr. Nkruma's views on personal liberty are to be found in his foreword to his book *Ghana*. There he states 'even a system based on social justice and a democratic constitution may need backing up during the period following independence by emergency measures of a totalitarian kind. Without discipline, true freedom cannot survive.'[26]

INDEPENDENCE OF THE JUDICIARY

An essential condition of personal liberty is a judiciary which is not dependent upon the party in power but will stand between the subject and infringement of his liberty by the executive. This requirement is rightly stressed by Lord Denning in considering personal liberty in England.[27] However, as the case of *Terrell* v. *The Colonial Secretary*[28] has illustrated, the colonial judiciary does not in law enjoy the same measure of independence as the judiciary of this country. This, however, is probably of little importance in view of the obvious independence which exists in fact. Indeed it may be suggested that the independence of the judiciary in this country is more the result of practice than upon the laws which are usually regarded as securing their independence. How far the constitution should provide for an independent judiciary has been one of the causes of conflict between the Convention Peoples Party and the Opposition in Ghana. Prior to independence the Ghana Government proposed that only judges below the Supreme Court should be appointed by the governor on the recommendation of the Judicial Service Commission and that the Chief Justice together with judges of the Supreme Court should be appointed on the advice of the Prime Minister. This led to adverse comment from the Colonial Secretary in the House of Commons who stated in the debate on the Ghana Independence Bill, 'It seems to me and to my colleagues in the United Kingdom Government that except for the Chief Justice . . . the final authority after independence should lie with . . . the Judicial Service Commission. I very much hope that this view will be shared on reflection by the Government of the Gold Coast.[29] In the event, the Ghana Government adopted a compromise. The Chief Justice is appointed on the advice of the Prime Minister; Justices of Appeal are appointed on the advice of the Prime Minister after consultation with the Chief Justice; and Puisne Judges are appointed on the advice of the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice, the Attorney General, a senior Puisne Judge and a senior Justice of Appeal. It is apparent that the opportunity to make appointments on a political basis exists under these provisions, but so does it in this country and much must depend upon the practice and tradition of those empowered to act.

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[26] At p. x (Foreword).
[27] *loc. cit.*
[28] [1953] 2 Q.B. 482.

FREEDOM FROM ARBITRARY ARREST AND SELF-DEFENCE

It is important not only that the powers of the political executive should be restricted by law and the independence of the judiciary secured, but also necessary for the powers of the police to be restricted within proper limits if personal liberty is to have any meaning. In other words, there should be freedom from arbitrary arrest. No man should be liable to be arrested except for a reasonable cause allowed by law. This is adequately secured in England. It is well known that the police can in general only arrest without a warrant where there are reasonable grounds for suspecting that a felony has been committed and that if no such reasonable grounds exist the arrested person has his remedy against the police. Similar provisions restricting the police appear to exist in most dependent territories. Again perhaps Aden may be cited as a typical example. There, section 35 of the Criminal Procedure Ordinance of 1954 provides that a person may be arrested if he has committed an offence or if reasonable complaint has been made against him or credible information has been received or reasonable suspicion exists of his having been so concerned.

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[29] H. of C. Debates, Vol. 562, col. 322. For an account of the pre-independence controversy over the proposed constitutional provision concerning the independence of the judiciary, see *Constitutional Experiments in British West Africa, Public Law,* Spring 1957, p. 47.

It is perhaps as important that a person wrongfully arrested should be able to defend himself against the police as that he should have a remedy in the courts afterwards. This is certainly the view taken by Lord Denning who contrasts the right of self-defence existing in England with the absence of such a right in France, where to defend oneself against the police or other public officers amounts to the criminal offence of rebellion.[30] In many dependent territories the position is as in France. Thus, for example, section 96 of the Aden Penal Code provides that 'there is no right to private defence against an act which does not reasonably cause the apprehension of death or of grievous bodily hurt if done or attempted to be done by a public servant acting in good faith under cover of his office, although that act may not be strictly justifiable in law.' Similar provisions exist in the Brunei Penal Code, and the Singapore Penal Code, amongst others. Whether the absence of such a right of self-defence against the police is undesirable or not, must, I think, depend upon the state of peace and order or otherwise existing in any particular territory. Lord Denning takes the view that 'individual freedom requires that a man should have power to resist an unlawful arrest, and if need be by force.'[31] It may well be, however, that in a country where there is no tradition of peace and order, to confer a right of self-defence against public servants arresting unlawfully would be to encourage disorder and violence.

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[30] *loc. cit.*, at p. 23.

[31] *ibid.*

CERTAINTY IN THE CRIMINAL LAW

It is clearly quite valueless to provide that there should be no arrest and no imprisonment without the commission of a criminal offence, if criminal offences themselves are wide and vague in character. If the substantive criminal law is uncertain, procedural certainty will not suffice to protect the individual against injustice and arbitrary power.

Perhaps the most outstanding recent example of the dangers of an ill-defined substantive criminal law is provided by events taking place in South Africa, particularly by the treason trial. Since 1948 the Nationalist Government in South Africa has of course passed a series of discretionary Acts which seriously threaten civil liberties generally within the Union. Such well-known laws as the Pass Laws, Group Area Acts, Prohibition of Mixed Marriages Act, and Immorality Act need no detailing here. However, the treason trial has further illustrated the danger involved in the existence of vague laws which make it impossible for the citizen to know whether or not he is likely to come into conflict with the law. The laws principally involved in the treason trial are treason, sedition, the Riotous Assemblies Act of 1914 and the Suppression of Communism Act of 1950. High treason is committed by those who with a hostile intention disturb, empower or endanger the independence or safety of the state or attempt or actively prepare to do so. It is thus much wider in definition than treason in this country. Sedition consists of the same elements, save that there is no need to prove a hostile intention. The Riotous Assemblies Act of 1914 prohibits any action calculated to cause hostility between the white section of the population on the one hand and any other section on the other hand. The Suppression of Communism Act, under which the accused is liable to ten years' imprisonment, in effect defines a communist as any person who is deemed by the Governor-General to be communist. It may not be inappropriate to note that the Governor-General is an ex-Minister of Native Affairs of the Nationalist Party. Not only are the above offences obviously lacking in definitiveness, but also under South African procedure no charges are laid until the preliminary enquiry is over.

It is apparent that there are many parts of the Commonwealth, both dependent and independent territories, where personal liberty is by no means as well-safeguarded as it is in England. Conditions of violence and disorder, or the possibility of those conditions, may well render it impossible to restrict the powers of the executive in those countries and so safeguard individual liberty to the same extent as in this country. At what point the line is to be drawn between the necessity of protecting individual freedom and the necessity of safeguarding the interests of the state, is a question on which opinions may well differ and upon which it is unwise perhaps to give an answer without detailed knowledge of prevailing conditions in the territories in question. The purpose of this paper has been merely to draw attention to the fact that such differences do exist.

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TRUSTS AND TAXATION

Ernest E. Scamell

In relation to a trust, taxation may be defined as those statutory provisions which secure that the Chancellor of the Exchequer, in his public capacity, shall be an important, if not the principal, beneficiary under the trust. The trust itself is more difficult to define,[1] and not always easy to recognise[2] but for present purposes it is sufficient to say that it is a vehicle by which Englishmen of property have for centuries sought to make provision for their families; having said that, it follows quite naturally that modern Parliaments should have used their best endeavours to 'follow' the trust property. I say 'modern' Parliaments because it has only been in the last sixty or seventy years that the impact of taxation on trusts has been strongly felt. It is, of course, many centuries since the days when it was possible under the old conception of the use for a *cestui que* use to plead that he had no property[3] and in fact, the jurisprudence of the law of trusts, and in particular the idea that a beneficiary's rights are primarily against the trustees and not the trust property has received several rude shocks in the sphere of taxation.

THE IMPACT OF TAXATION ON TRUSTS

In order to give something of a background to the more particular aspects of the subject, I propose to refer to one or two examples of the way in which certain principles and rules of taxation have been applied (with devastating results) in the law of trusts.

(1) *The property which 'passes on death.'* Under section 1

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[1] See Keeton, *Law of Trusts*, 7th ed. (1957), pp. 1–5.

[2] See *Bannister* v. *Bannister* [1948] 2 All E.R. 133.

[3] In the fourteenth and fifteenth centuries the Franciscan Friars were able, by means of the use, to keep their vows of poverty whilst enjoying the full benefit of the monasteries and other property held in use.

of the Finance Act, 1894, estate duty is payable upon the principal value of all property real or personal, settled or not settled, which passes on the death of any person. In *Cowley (Earl)* v. *Inland Revenue Commissioners*,[4] the principle was laid down that where property is settled for the benefit of persons in succession, then where one tenant for life dies and is succeeded by another the property which passes is not the life interest but the settled property itself. This was quite inconsistent with generally accepted notions concerning the actual beneficial interest which passed. For example, suppose certain investments were held by trustees in trust to pay the income thereof to A for life and subject thereto to B for life and subject thereto to C absolutely. Now it is clear that from the moment of creation of the trust, A, B and C each have a present valuable interest under the trust, that is to say, the entire beneficial interest arising under the trust is split up amongst A, B and C. Yet on the death of A, it is not merely his life interest which is considered as passing; further it is not merely the entirety of the beneficial interest arising under the trust whose value might be greater or less than the value of the trust property itself by reason of the trustees' overreaching powers; but what is deemed to pass is the settled property itself and accordingly on the death of every tenant for life estate duty is payable, upon the principal value of the settled property at that date.[5] Thus, during the continuance of a trust for the benefit of persons in succession the position is that (subject to one exception in favour of a 'spouse and children' settlement to which I shall refer later) the Chancellor of the Exchequer becomes a beneficiary as many times as there are successive tenants for life becoming entitled under the trust.

(2) *What is 'trust income' for purposes of income tax?* There are two important ways in which tax decisions have given a somewhat extended meaning to the traditional or pure answer to this question, with penal consequences to the recipients.

(a) In the first place, the House of Lords held, by a majority, in the well-known case of *Baker* v. *Archer-Shee*[6] that what a life tenant under a trust is entitled to is the actual income in specie of the property for the time being subject to the trust. Accordingly, notwithstanding that under the terms of the trust or by the general law the trustees may be entitled before paying any income to the life tenant, to deduct the amount of their costs, charges and expenses, the life tenant is taxable in respect of the gross income and not the net income he or she in fact receives. This decision is the more disturbing since the majority of the Lords of Appeal arrived at their decision, not by stating that in matters of tax, technicalities affecting the law of trusts may be disregarded, but by elaborating general principles of law affecting the nature of a beneficiary's interest under the trust. Professor Hanbury, however, has expressed the hope that the decision will be restricted to income-tax cases[7] and certain later cases seem tacitly to have given effect to this suggestion.[8]

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[4] [1899] A.C. 198.

[5] See the application of this principle in *Christie and Others* v. *Lord Advocate* [1936] A.C. 569.

(b) Secondly, with the uncertainties attaching to the amount of annual income which could reasonably be expected to flow from a given trust fund, it became a fairly common practice for settlors to 'guarantee' a certain minimum income to the life tenant by means of a provision conferring power on the trustees to raise capital for the purpose of making up the actual income to a specified annual sum. In the case of *Brodie's Trustees* v. *Inland Revenue Commissioners*[9] the question arose whether capital sums so raised and paid to the tenant for life, were subject to income tax in view of their capital source. It was held that they were.[10] This is not to say, however, that all payments made to a beneficiary out of capital are taxable as income—it depends whether they are adjuncts to pure income payments or are payments of capital in their own right.[11] Thus, it has never been suggested that an advancement made under the statutory power should be treated as income for income tax purposes.

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[6] [1927] A.C. 844.

[7] See (1928) 44 L.Q.R., pp. 471–2.

[8] See, for example, *Schalit* v. *Nadler* [1933] 2 K.B. 79; and see *Re George Wickelow Ltd.* [1954] 1 W.L.R. 5.

[9] (1933) 17 Tax Cas. 432.

[10] See also *Cunard's Trustees* v. *Inland Revenue Commissioners* [1946] 1 All E.R. 159 (C.A.); *Lindus & Horten* v. *Inland Revenue Commissioners* (1933) 17 Tax Cas. 442.

[11] See the remarks of Finlay, J., in *Brodie's Trustees* v. *Inland Revenue Commissioners, supra,* at p. 439 and of Lord Greene, M.R., in *Cunard's Trustees* v. *I.R.C.,* supra, at p. 163.

(3) *Who is taxable in respect of trust income?* The prima facie answer to this question is 'the person entitled under the terms of the trust instrument to receive the income.' This, however, is by no means a completely accurate answer. In several cases, the income of a beneficiary is, for income tax and surtax purposes, treated as the income of the settlor. Examples of such cases are as follows—

(a) Where the trust is revocable, either directly or indirectly, and the settlor or his or her wife or husband stands to benefit by such revocation.[12]

(b) Where under the trust the settlor is entitled to receive any income.[13] In such a case, any income arising during the life of the settlor in any year of assessment is, *if undistributed,* treated for income and surtax purposes as the income of the settlor. To take an illustration, suppose that a settlor who owned shares producing £500 a year executed a declaration of trust declaring that he held such shares as trustee upon trust to accumulate the income during the minority of his infant grandson and subject thereto upon trust as to both the capital and the accumulated income for his said son absolutely. So far, no special difficulty would seem to arise. But suppose further that the trust instrument contained a charging clause entitling the trustee or trustees for the time being to charge for his or her services as such trustees. It would seem that if the settlor took such remuneration under such a charging clause, not only such remuneration, but the whole of the accumulated income would be treated for tax purposes, as the income of the settlor.[14]

(c) Where the trust is for the benefit of a child of the settlor then any income to which the child becomes entitled *during his minority* and until the end of the tax year in which he attains his majority is treated as the income of the settlor and not of the child.[15]

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[12] See s. 404 of the Income Tax Act, 1952.

[13] See s. 405 of the Income Tax Act, 1952.

[14] See on a different but analogous taxation point *Oakes* v. *Stamp Duties Commissioner of New South Wales* [1954] A.C. 57.

[15] See s. 397 of the Income Tax Act, 1952.

In all the above cases, whilst the settlor is clearly not entitled to receive the trust income in question he is nonetheless taxable in respect of it.

When there is added to the tax consequences, which I have mentioned, the post-war heavy increase in the rates of all taxation whether in the form of income tax, surtax, estate duty or stamp duty, it is not surprising that since the war the legal profession has been engaged in attempting to implement the requests of beneficiaries to break up their trusts either wholly or in part.

THE BREAKING UP OF A TRUST

In dealing with this matter, two separate questions arise: first, can the trust be broken? Secondly, by what precise method *should* it be broken? At first sight it might seem that once a favourable answer has been found to the first question then the method by which the breaking-up is carried out would be of little or no practical consequence. For estate duty purposes, however, this is far from being the case. Both questions, therefore, require to be considered in some detail, and I propose to take each in turn.

(1) *Can the trust be broken?* It is clear that when a settlor or testator creates a trust he intends it to take effect according to its terms. Nevertheless, there are three ways in which it may be possible to break the trust either in whole or in part—

(a) Under the rule in *Saunders* v. *Vautier*[16];

(b) In the exercise of a power conferred by the trust instrument or by statute;

(c) Under an order of the court in appropriate cases.

(a) Where all the possible beneficiaries under a trust are in existence and *sui juris* then under the rule in *Saunders* v. *Vautier* they can together call upon the trustees to dispose of or divide up the trust property according to their wishes. This is a rule which is well established and of which great advantage is constantly being taken at the present time. It has, however, obvious limitations and will only apply where it can in fact be shown that the entire beneficial interest under the trust is vested in persons of full age and capacity *and no other persons.*

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[16] (1841) Cr. & Ph. 240.

(b) *Express or statutory power.* It is rare for trust instruments to confer upon one beneficiary or group of beneficiaries express power to determine a trust either in whole or in part, but such a power is frequently conferred upon trustees and when it is, full advantage may be taken of it. In the older trusts, it is rare to find a power authorising the trustees to determine the trust *in toto,* but a more limited power of this sort often appears in the guise of a power of advancement and where there is no such power, one will, in many cases, be implied under section 32 of the Trustee Act of 1925. Under this section (which does not apply to settled land or to capital moneys arising under the Settled Land Act, 1925) trustees may for the advancement or benefit of a beneficiary entitled, either absolutely or contingently, to the whole or any share of the *capital* of the trust property pay over to such person an amount not exceeding one half of that beneficiary's presumptive or vested share. By the exercise of such a power the amount of capital left in the trust can be materially reduced.[17]

In the case of powers expressly conferred upon trustees to determine or rewrite the trusts either in their discretion or upon the happening of certain events, there has as yet been no reported decision turning upon their validity. Such powers must undoubtedly confer a very wide discretion upon trustees which might easily lend itself to abuse; and the courts are extremely jealous of anything which places a trust outside effective judicial control.[18] There seems no reason, however, why, with careful drafting, such powers should not be upheld for they can hardly be wider in the discretion they confer than discretionary trusts.[19]

(c) *Order of the Court.* Where neither of the last two-mentioned possibilities will secure the desired results, then the only remaining possibility is to consider whether the court has jurisdiction to entertain, on its merits, an application to determine or vary the trust. Now if the rule in *Saunders* v. *Vautier* cannot be relied upon it will necessarily be because infants or unascertained persons are or may become beneficiaries under the trust. In such a case it was formerly the view of the legal profession that if all the adult beneficiaries were of one mind, so that the only thing standing in the way of their proposals was the incapacity of the infant or unascertained beneficiaries to agree, then the court had inherent jurisdiction, in all such cases, to act on behalf of the infant or unascertained beneficiaries, and for fifty years prior to 1954 the court would, if satisfied that the proposed scheme for winding up the trust would be to their advantage, make an order accordingly. In *Chapman* v. *Chapman*,[20] however, the House of Lords held that no such wide inherent jurisdiction was vested in the court. Nevertheless, in specific cases the court does in fact possess jurisdiction to act on behalf of infant beneficiaries.

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[17] For an illustration see *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902.

[18] See *Re Wynn* [1952] Ch. 271.

[19] See Nathan, *Equity through the Cases* (1954), 3rd ed., p. 290.

(i) First there is the jurisdiction conferred by statute upon the court to determine or vary marriage settlements on the dissolution of marriage.[21] This jurisdiction is clearly of limited application.

(ii) Secondly it was held by the Court of Appeal in *Re Downshire's Settled Estates*[22] that in the case of a trust of land falling under the provisions of the Settled Land Act, 1925, the court had jurisdiction to sanction a scheme for winding up a settlement under the provisions of section 64 of the Settled Land Act, 1925. This section provides that 'any transaction affecting or concerning the settled land or any part thereof or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the person interested under the settlement may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.' Now one limitation of this provision is that the proposed transaction must 'affect or concern' settled land. It is significant that in *Re Downshire's Settled Estates* itself the scheme which the court was asked to sanction was concerned mainly with capital moneys; but since the scheme would also either directly or indirectly affect the settled land it was held that the above-mentioned condition was satisfied. Further, in *Re Simmons*[23] Dankwerts, J., held that since by section 28 of the Law of Property Act, 1925, trustees for sale of land had all the powers of a tenant for life and of statutory owners under the Settled Land Act, 1925, section 64 of the latter Act applied, and accordingly the court had jurisdiction under the section to sanction a scheme concerning land held upon trust for sale.

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[20] [1954] A.C. 429.

[21] See s. 192 of the Judicature Act, 1925, now s. 25 of the Matrimonial Causes Act, 1950; *Smith* v. *Smith* [1945] 1 All E.R. 584.

[22] [1953] Ch. 218.

(iii) Thirdly, section 53 of the Trustees Act, 1925, provides that where an infant is beneficially entitled to any property, the court may, with a view to the application of the capital or income thereof for the maintenance, education or benefit of the infant, make an order appointing a person to convey such property. One of the more recent cases which have turned specifically on this section is *Re Heyworth's Contingent Reversionary Interest*,[24] where the application failed since it was not shown that the object of the application was to provide for the maintenance, education or benefit of the infant. In *Re Meux*,[25] however, the application suceeded. It would seem, however, that this section has hitherto been unjustifiably overlooked and much more may be heard of it in the future.[26]

It seems highly likely that the *Variation of Trusts Bill* recently introduced into the Commons by Mr. Peter Crowder, Parliamentary Secretary to the Attorney-General, to give effect to the recommendations of the Sixth Report of the Law Reform Committee, will become law, in which case the decision of the House of Lords in *Chapman* v. *Chapman* will, in effect, be reversed in favour of the dissenting judgment of Lord Denning in that case in the Court of Appeal. If the Bill is passed, then the specific heads of jurisdiction referred to above will clearly become less important but it is at present impossible to foretell whether the Bill will be all-embracing when it finally emerges from the legislative process.

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[23] [1956] Ch. 129.

[24] [1956] Ch. 364.

[25] [1957] 2 All E.R. 630.

[26] See hereon an article by Prof. O. R. Marshall in *The Conveyancer and Property Lawyer* (N.S.), Vol. 21, pp. 448–54.

(2) *How should the Trust be broken?* Once it is decided that a trust can be broken in one or another of the ways which I have mentioned, the next question is what precise scheme of arrangement would be most beneficial. Even in the case of the exercise of a power of advancement there is some choice, though the scope is necessarily somewhat limited.[27] But in the case of a scheme of arrangement to be made under the rule in *Saunders* v. *Vautier* or to be made the subject-matter of an application to the court for its sanction, several alternative arrangements are usually possible. Of course much will depend upon the particular beneficial interests concerned, but the general pattern is usually that of a beneficial interest in possession followed by other beneficial interests in remainder or in reversion one or more of which may be contingent or vested in an infant. I propose first of all to consider the various possibilities in relation to the simplest form of trust and then to point out the differences which would arise when the form of trust is varied in a particular way.

Suppose that certain investments are held by trustees upon trust for A for life and subject thereto for B absolutely, and that both A and B are of full age. In order to save estate duty on A's death A and B decide that they will put an end to the trust and divide the investments between them according to the actuarial values of their respective interests. The first step would be to have the investments valued—let us assume that the value is £100,000. Secondly an actuary would be instructed to value the respective interests of A and B under the trust on the basis that no estate duty would be payable on A's death and disregarding the question of the costs of realisation. The valuation would normally be made in terms of percentages, and if A's life interest were valued at 40 per cent and B's reversion at 60 per cent the resulting values would be £40,000 in respect of A's interest and £60,000 in respect of B's interest. On such a basis several alternative methods of determining the trust present themselves.

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[27] See *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902.

(a) The simplest method of effecting the division would be for A and B to call upon the trustees to divide up the trust property accordingly, but two very serious disadvantages attach to such a course. First, in the event of A dying within five years of the distribution, the fund taken by B would be deemed to pass on A's death and be liable to estate duty accordingly. This is the effect of section 43 (1) of the Finance Act, 1940.[28] At the end of the five year period, however, this liability would come to an end.[29] Secondly, the effect by section 44 (1) of the Finance Act, 1950, in such a case is that the *trustees* would be accountable for the estate duty in the event of A's death within the five years. It follows that the trust could not usually be finally wound up until the end of the five year period since the trustees would be entitled to retain a sufficient fund to meet the prospective liability for duty.[30]

(b) A second method would be for A to assign his interest in the whole fund to B in return for a covenant by B to pay an annuity to A equal in amount to the present income of the fund. If this course were adopted, however, no tax gain whatsoever would be achieved since the covenant to pay the annuity would amount to the reservation of a 'benefit by contract' within the meaning of section 43 (2) (*a*) of the Finance Act, 1940.

(c) A third and by far the most satisfactory method would be for A to purchase the interest of B at its actuarial valuation (£60,000). On the death of A no estate duty would be payable on any of the trust property *as such* even though A might die immediately since section 43 (1) of the Finance Act, 1940, only applies where a life interest is disposed of or determined and, although there is no decision on the point, it is the current view of the Estate Duty Office that if the life tenant acquires the interest of the reversioner the life interest is *enlarged* and not determined. This method will only succeed in avoiding estate duty, however, if the purchase money provided by A is raised from a source which is quite independent of the trust property; thus, if the money were borrowed, it would be essential that it should not be secured on the trust property. In normal times, however, it would usually be possible for A to arrange a temporary unsecured loan which could be repaid in due course by a sale of a sufficient amount of the trust investments which, after the purchase, would become the exclusive property of A.

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[28] See *Att.-Gen.* v. *Llewellyn* [1935] 1 K.B. 94. Symon, *Death Duties*, 9th ed. (1942), at p. 33.

[29] Subject to compliance with conditions (*a*) and (*b*) of s. 43 (2) of the Finance Act, 1940.

[30] Under s. 44 (3) of the Finance Act, 1950, the trustees may obtain from the Commissioners of Inland Revenue a certificate of the amount of duty prospectively payable, and in such a case the accountability of the trustees is limited to the amount so certified.

There are, of course, several other possible ways in which A and B could wind up the trust, but these three examples are sufficient to emphasise the need for extreme caution. They all produce essentially the same result but with wholly differing consequences so far as liability to estate duty is concerned.

Before leaving this part of the subject I may perhaps refer to one or two variations on the above-mentioned simple example which frequently crop up.

First, it may happen that the trust property is held in trust for A for life with remainder to such of his children as he may by deed appoint. Now if A has several children some of whom are infants and others of whom are of full age, and he exercises the power in favour of those of his children who are of full age to the exclusion of the infants, with a view to their being able, at a future date, to join together to wind up the trust, the question might arise whether the appointment constituted a fraud on the power. The answer to this question would depend upon all the circumstances and in particular whether the appointment was made in pursuance of any kind of bargain, understanding or overriding hope that the appointees would enter into a scheme of arrangement with the appointor.[31]

Secondly, it frequently happens that instead of having an absolute life interest, A is given a protected life interest—as was the case in *Re Downshire's Settled Estates* and *Re Blackwell's Settlement Trusts.* In such a case it is impossible to break up the trust without the assistance of the court since in the event of A attempting to charge or alienate his interest, discretionary trusts would immediately come into operation, possible objects of which are any spouse of A and any children, grandchildren or remoter issue of A born or to be born. The potential interests of such unascertained persons cannot be overlooked and assuming that the case is one in which the court has jurisdiction to entertain the application, it would, before approving any scheme of distribution, require to be satisfied that these 'discretionary' interests were fully protected. It is usual for the Court to be satisfied thereon if there is set aside a relatively small sum for the benefit of the possible beneficiaries under the contingent discretionary trusts.

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[31] See *Re Merton* [1953] 1 W.L.R. 1096; *cf. Re Greaves* [1954] Ch. 434 at 445.

Thirdly, sandwiched in between the life interest of A and the reversion of B there might be a contingent interest in favour of an unborn son of A. In such a case the approval of the court on behalf of the unborn beneficiary would be required to any scheme and would usually be given (assuming the court has jurisdiction) if it appears that such a child were unlikely to be born, and if an insurance policy were provided which, for a single premium, would provide for the payment to the trustees of a sum sufficient to give effect in full to the interests of any child who might subsequently be born and become entitled to a beneficial interest under the trust.

TRUSTS FOR SAVING INCOME TAX AND ESTATE DUTY

Although, as will have appeared from what I have stated, it is often more beneficial from the tax point of view to break a trust than to allow one to continue, nevertheless, certain types of trust can actually effect a considerable saving in taxation of one kind or another. Much has been written on trusts to save income tax and precedents have been published,[32] and to keep this paper within reasonable bounds, I propose to confine my attention to three types of trust which are capable of achieving considerable savings in estate duty, namely, the 'spouse and children' settlement, discretionary trusts and trusts of insurance policies.

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[32] See Potter and Monroe, *Tax Planning with Precedents*, 2nd ed. (1956). See 'Settlements to avoid Income Tax,' E. H. Bodkin, *The Conveyancer and R.P. Lawyer*, pp. 81–6; for precedents see *ibid.*, pp. 348–54 and 337–46.

(1) *The 'spouse and children' settlement.* By virtue of the combined effect of section 5 (2) of the Finance Act, 1894, and section 14 of the Finance Act, 1914, an exemption from estate duty is conferred where settled property passes or is deemed to pass on the death of one party to a marriage, and duty has already been paid in respect of the property on the death of the other party. Thus rather than leave property to a wife absolutely in the expectation that she would, in her turn, leave it to the children of the marriage, which would mean that the property would bear duty on the husband's death and again on the wife's death, it would be far more advantageous if the husband gave his wife a life interest only with a gift over to her children on her death, for in such a way, whilst estate duty would be payable on the death of the husband in the ordinary way, none would be payable on the death of the wife.

It may be noted, however, that this benefit might be lost and the property might be deemed to pass on the wife's death if she should join with her children to break up the trust and divide the trust property.[33]

(2) *Discretionary Trusts.* Where property is held upon trusts which confer upon the trustees an absolute discretion as to the disposition of the trust property or the income thereof amongst a class of beneficiaries or several named beneficiaries, then so long as there remain at least two members of the discretionary class, the death from time to time of any member of the class will not attract estate duty since a beneficiary under a discretionary trust is, for purposes of estate duty, not considered as having any interest and accordingly on the death of one member, nothing passes to the survivors. An example, of this occurred in *Re Bibby*.[34] This was a case involving a pension scheme under which trustees had power to award pensions to retired employees of a firm or their widows. One of the clauses of the trust deed provided that in exercising any of their powers the trustees should have an absolute

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[33] See s. 5 (2) of the Finance Act, 1894.

[34] [1952] 2 All E.R. 483.

and uncontrolled discretion. On the death of an employee the trustees awarded an annuity to his widow and the question was whether such annuity arose by reason of the death of the employee so as to attract estate duty. It was held that since under the discretionary clause the widow had no legal or equitable right to receive the annuity it could not be considered as being a benefit attributable, for death duty purposes, to the death of her husband.

(3) *Trusts of insurance policies.* The statutory provisions concerning the incidence of estate duty in connection with trusts of insurance policies are peculiarly complex and have produced certain anomalies. One striking example of this is provided by the recent decision of the Court of Appeal in *Re Hodge's Policy.*[35] There, the plaintiff's father effected a policy of assurance on his own life in 1912 and assigned it to his son in 1913. The policy became fully paid up in 1916 and in 1950 the father died, so that the policy moneys became payable. The Crown claimed duty on the whole of the policy moneys under section 11 (1) of the Customs and Inland Revenue Act, 1889, which renders dutiable 'money received under a policy of assurance . . . wholly kept up by (the assured) for the benefit of a donee.'[36] The court found itself reluctantly bound to hold that notwithstanding the policy had been fully paid up for upwards of forty years and that no beneficial interest in it had passed as a result of the death, section 11 (1) of the above-mentioned Act applied so that estate duty was payable. Moreover in the instant case the rate of duty would be ascertained by aggregating the policy moneys with the assets of the deceased's estate, since between 1912 and 1913 the deceased had a disposable interest in the policy.

Despite this case, however, it is possible to secure distinct advantages where the trust property consists of a policy of insurance.

(a) *The policy may form a separate estate so as to avoid aggregation.* In the first place, section 4 of the Finance Act,

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[35] See *The Times,* November 14, 1957.

[36] See also s. 2 (1) (*c*) of the Finance Act, 1894.

1894, provides that 'the property in which the deceased never had an interest . . . shall not be aggregated with other property but shall be an estate by itself and estate duty shall be levied at the proper graduated rate on the principal value thereof.' The effect of this provision is that property to which it applies is not aggregated with the deceased's other property for the purpose of determining the rate of duty. Thus it would apply to money payable on the deceased's death under a policy of insurance where the beneficial interest was *from the inception of the policy,* vested absolutely and irrevocably in trustees.[37] Accordingly, all that is necessary in order to secure the benefit of the provision is for the settlor to ensure that the policy becomes subject to the trust immediately it is issued.

(b) *Section 11 of the Married Women's Property Act, 1882.* Two enormous tax advantages can be gained by taking advantage of the provisions of this section which provides that a policy of assurance effected by a man 'on his own life' and expressed to be for the benefit of his wife or his children or any of them creates a trust in favour of the objects therein named and the moneys payable under any such policy do not, so long as any object of the trust remains on foot, form part of the estate of the insured. Thus a policy falling under the section not only ensures that no estate duty will be payable on the assured's death (even though he should die within five years), but also avoids the necessity for executing an instrument of trust which would normally attract *ad valorem* stamp duty of the rate (at present) of 2 per cent on the value of the trust property.

(c) *Section 11 of the Customs and Inland Revenue Act, 1889, and Section 2 (1) (c) of the Finance Act, 1894.* As the decision in *Re Hodge's Policy,* to which I have already referred, shows, where all the insurance premiums were paid by the deceased, then it is the actual money received under the policy which is deemed to pass and (at present) this is so notwithstanding that the last premium might have been paid more than five years before the deceased's death. Where, however, a policy is assigned to trustees and subsequent premiums are paid *by them,* then section 11 of the Customs and Inland Revenue Act, 1889, does not apply and what passes is not the insurance money, but the beneficial interest in the policy at the date of the creation of the trust. Accordingly, should the settlor survive for a period of five years no estate duty would be payable: *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[38] and the corollary—that if the settlor should die within five years, duty is payable not on the policy moneys but only upon the value of the policy at the date of the settlement—has just been affirmed by the House of Lords in *Westminster Bank* v. *Inland Revenue Commissioners*.[39]

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[37] See *Green's Death Duties,* 3rd ed., p. 253.

THE FINANCE ACT, 1957, S. 38

I may perhaps say, in passing, that before the latest Finance Act came into operation it used to be possible to secure distinct death duty advantages by means of a device known as the 'bonus issue' scheme. This was a device whereby shares in a private company would be vested in trustees upon certain trusts. Now if the settlor died within five years estate duty would be payable on the value of the shares *at the date of his death*.[40] In order to reduce such value, therefore, the settlor (who may be presumed to be in control of the private company) would cause the company to issue a large number of bonus shares to the existing shareholders, including the trustees, the effect of which would, of course, be to reduce the value of the original (and dutiable) shares (though not of the *total* shareholding). This process has, however, now been arrested as to new trusts, by section 38 (4) of the Finance Act, 1957.

GENERAL CONCLUSION

It may well be that in dealing with such a very large subject in a very small compass I have satisfied nobody, but my main purpose is not so much to point the way of the taxpayer as to consider how certain traditional trust doctrines have been affected by the present day Marxist approach, and in the light of the earlier discussion I propose to summarise some of the consequences of this approach.

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[38] [1953] A.C. 347.
[39] [1957] 3 W.L.R. 427.
[40] See *Re Sneddon* v. *Lord Advocate* [1954] A.C. 257.

(1) *Trusteeship.* The textbooks state with complete accuracy that the settlor can always be a trustee. There are, however, several tax reasons why it might be well-nigh disastrous for a settlor to be or become a trustee.

(a) In the first place, if the statutory power of advancement were exercised by a trustee/settlor in favour of a beneficiary who was a relation of the settlor, it is possible that such an exercise would be regarded as a gift for estate duty purposes under section 44 (1) of the Finance Act, 1940.

(b) Secondly, in the case of a discretionary trust, it would seem that if the settlor were a trustee, he might be considered as retaining an interest which would prevent the trust fund from ever escaping from estate duty on the settlor's death.

(c) It is clear that where the settlor is a trustee and the trust instrument includes a charging clause, then the trust cannot be said entirely to exclude the settlor from all benefit and again estate duty would be payable on the whole trust fund whenever the settlor died.[41]

So common are all the above matters that it clearly becomes undesirable for a settlor to be or become trustee. Further, to secure that he does not become one by later appointment, it is advisable for the power of appointing new trustees to provide expressly that the settlor shall in no circumstances be appointed.

(2) *The rule in Saunders* v. *Vautier.* This rule is modified by the provisions of section 44 of the Finance Act, 1950, which render trustees accountable for estate duty and thus entitle them to retain part of the trust property to meet the potential liability for duty. Further, whilst it is possible for this liability to be quantified in the case of the release of a life interest, it appears not to be possible in the case of the surrender of a reversion though usually (but not always) such a surrender will not give rise to any liability to estate duty for which the trustees would be accountable.

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[41] See *Oakes* v. *Stamp Duties Commission of New South Wales* [1954] A.C. 57.

(3) *The Trust Property.* Whilst most forms of property can be settled, certain types of property can be settled to greater advantage than others. Examples are Insurance Policies and agricultural land, though not (since the Finance Act, 1957) shares in a company controlled by the settlor.

(4) *Trustee Investments.* The investments likely to be chosen by trustees may well be influenced by the fact that no stamp duty is payable on purchases of government securities.

(5) *Accumulations.* Trusts for accumulation of income may well be disastrous because of the application of section 21 (3) of the Finance Act, 1936.[42] Accordingly, the statutory power to accumulate conferred by section 31 of the Trustee Act should usually be appropriately modified.

A consideration of these and other matters indicates that the incidence of taxation is having, and is likely to have, an important influence on trusts, and must be ranked as a significant factor in the evolution of the law of trusts generally.

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[42] See now s. 403 of the Income Tax Act, 1952.

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APPEALS ON QUESTIONS OF FACT

DOUGLAS-PAYNE

APPEALS are an important factor in the cost of litigation. If a case originates in the High Court there is an absolute right of appeal to the Court of Appeal on questions of law and fact, with a further right of appeal to the House of Lords, if leave is granted by either the Court of Appeal or House of Lords.[1] If it originates in the county court the right of appeal depends on the amount in issue.[2] If the action is one of contract or tort and the amount claimed exceeds £200, there is the same right of appeal on questions of law and fact to the Court of Appeal and House of Lords as in the case of an action commenced in the High Court. If the amount claimed is less than £200 an appeal lies only on a point of law or equity, or on the admission or rejection of evidence.[3] The cost of litigation has always been high in England, and the burden of such a system of multiple appeals is bound to be heavy however the costs are distributed between the parties. It is particularly onerous when, as under the existing law, the general rule as to costs is that they follow the event of an appeal, with the result that the final loser on appeal is normally ordered to pay his opponent's costs both of the appeal and the proceedings below.

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[1] Appeals to the House of Lords were made subject to the leave of either the Court of Appeal or House of Lords by the Administration of Justice (Appeals) Act, 1934, s. 1, as the result of the recommendations of the Hanworth Committee on the Business of the Courts, Cmd. 4471.

[2] Until 1956 there was no appeal from a county court on a question of fact except in admiralty proceedings. But when the jurisdiction of the county courts was extended by the County Courts Act, 1955 (from £200 to £400 in contract and tort and with extensions in other matters) a right of appeal on questions of fact was conferred, by s. 12, in actions which, but for the extended jurisdiction, would have had to be brought in the High Court. The Evershed Committee on Supreme Court Practice and Procedure, in its Final Report in 1953 (Cmd. 8878, p. 187), recommended that there should be an absolute right of appeal from the county court on a question of fact where the amount claimed exceeds £100 in contract and tort and a corresponding figure in other cases.

[3] County Courts Act, 1934, s. 105. There is no appeal without the leave of the judge where the amount in dispute does not exceed £20: County Courts Act, 1934, s. 105.

THE EVERSHED REPORT

The question of appeals was one of the matters recently considered by the Evershed Committee on Supreme Court Practice and Procedure, which was appointed in 1947 to consider ways of reducing the cost of litigation. In its Final Report,[4] which appeared in 1953, the Evershed Committee expressed dissatisfaction with the present system of multiple appeals. The ultimate loser, the Report points out, may have to pay his own and his opponent's costs of three separate hearings, while even the party who is ultimately successful may find that the value of the judgment he has obtained is out of proportion to his own bill of unrecovered costs.[5] Further, the prospective litigant is quite unable to count the cost of embarking on litigation beforehand, since he can never know how far his case may go.

Unfortunately, however, though the Evershed Committee thought it right on general principle that only one appeal should be allowed from a trial judge, it felt that it was excluded by its terms of reference from considering the appellate jurisdiction of the House of Lords and the possibility of reducing the number of tiers in the appellate structure.[6] All that it could recommend therefore was that the Court of Appeal and House of Lords should so far as possible be alternative appeal courts, and to achieve this the Committee proposed that a High Court judge should in certain circumstances have power to direct that an appeal from his judgment should leap-frog the Court of Appeal and go direct to the House of Lords.[7] But this proposal did not commend itself to the Law Lords when they were consulted by the Committee. They thought it would probably overload the work of the House, and they were also loath to be deprived of the benefit of the judgments of the Court of Appeal.[8] Whatever the merit of these objections, it is hardly surprising, in view of their opposition and the consequent diffidence with which the Committee put forward its recommendation, that nothing has come of it. And perhaps this is as well, for if the principle that there should be only one appeal from a trial judge is right, some more drastic reform of the English legal system would seem to be required than the curious 'leap-frog' proposal put forward by the Evershed Committee.

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[4] Cmd. 8878, section vii.

[5] If his opponent is an assisted person under the Legal Aid and Advice Act, 1949, his liability for the costs of the successful party 'shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute': s. 2 (2) (*e*).

[6] Cmd. 8878, p. 154.

[7] The Committee recommended that this power should, for a trial period at least, be confined to cases where:—

(a) the question or questions proposed or liable to be the subject of appeal was or were essential to the determination of the cause;

The existing system of multiple appeals is particularly indefensible when the question at issue on appeal is one of fact. When a case involves a point of law of far-reaching importance, which affects the acquisition of property or the manner in which people order their affairs or which will affect the course of decision of future courts, the general interest of society in the predictability of the law clearly necessitates a system of appeals from courts of first instance to a central appeal court—though whether it justifies our existing system of multiple appeals in which the cost is borne by the unfortunate litigants is another question.[9] The real justification for appeals on questions of this

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(b) such question or questions was or were of substantial legal or public importance and *either*
  (i) covered by an earlier decision of the Court of Appeal the validity of which was to be tested; *or*
  (ii) wholly or substantially a question or questions of constructions of a statute or statutory instrument;

and (c) the question or questions had been fully argued and considered in the judgment or judgments (in case (b) (i) above) in the previous Court of Appeal case or (in case (b) (ii) above) on the trial before the certifying judge.

[8] Cmd. 8878, pp. 158–9. Some of the Law Lords questioned the general principle that one appeal from the trial court should suffice, on the somewhat curious ground that 'it was inherent in our system that cases should only reach the House of Lords by a regular gradation through the Court of Appeal and that any departure from this system must be to the detriment of the *corpus juris Angliae*': *ibid.*, at p. 159.

[9] The Evershed Committee recommended that the Attorney-General, if he considers that a case involves a point of law of exceptional public interest, should have power to issue a certificate authorising the use of public funds to assist the parties to prosecute the case in accordance with the ordinary appeal procedure: Cmd. 8878, section ix. But nothing has come, or is likely to come, of this suggestion.

sort is not so much that the law laid down by the appeal court is likely to be superior to that laid down by a lower court as that there should be a final rule laid down which binds all future courts and so facilitates the prediction of the law. In such a case the individual litigants are sacrificed, with some justification, on the altar of law-making, and must find such consolation as they can in the monument of a leading case.

But when the question at issue is one of fact, the same general interest in the outcome of the case cannot be invoked to justify appeals. Appeals on questions of fact require therefore to be justified as being in the true interests of the parties to a dispute, and in this paper I shall try to show that the existing provision for appeals on questions of fact not only fails to serve the true interests of the parties to a dispute, but has a number of harmful effects on the administration of the law in general.

THE SYSTEM OF APPEALS BEFORE THE JUDICATURE ACTS[10]

We owe our present system of appeals from superior courts principally to the reforms of the Judicature Acts of 1873 and 1875. In English law the right to appeal from a court of first instance to a higher court which can correct mistakes of law and fact and give judgment accordingly exists solely by virtue of statute.[11] Before the Judicature Acts there was strictly no appeal at all in this sense from the judgment of a common law court. Trials took place at *nisi prius* before a judge and jury,[12] but the judge, if he allowed the case to go to the jury, could not give judgment in accordance with the jury's verdict. He returned the case, with a note of the verdict, to the common law court to which he belonged, and it was the full court or court *in banc* which directed judgment to be entered. Before judgment was directed it was open to an aggrieved party to apply to the court *in banc* for a new trial on a number of grounds, the principal of which were misdirection of the jury, erroneous rulings by the trial judge on the legal effect and admissibility of evidence, that the verdict was irreconcilable with the evidence or that the damages were excessive. The court *in banc* had power to grant a new trial on any of these grounds, or to give the judgment which was the proper consequence of the jury's verdict.[13] It also had power, where there had been misdirection, to enter the verdict which would have resulted had there been no misdirection. But if the jury had been properly directed, the court *in banc* could not give judgment contrary to the jury's verdict unless the trial judge had reserved leave with the consent of the parties to move the court *in banc* to do so.[14]

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[10] For a review of the system of appeals before the Judicature Acts, see C. H. O'Halloran, 'Right of Review and Appeal in Civil Cases before the Judicature Acts, 1875,' (1949), 27 C.B.R. 46.

[11] *Att.-Gen.* v. *Sillem* (1864) 10 H.L. Cas. 704.

[12] There was no provision for the trial of a common law action by a judge sitting alone until the Common Law Procedure Act, 1854, and even after that Act only with the consent of the parties.

From the judgment of the court *in banc* the only remedy was by way of Writ of Error to the Court of Exchequer Chamber, and thence by further Writ of Error to the House of Lords. Until 1852 a Writ of Error was in the nature of an entirely fresh proceeding, in which the applicant was described as the 'plaintiff in error,' and in which the jurisdiction of the Court of Error was confined to correcting errors of law appearing on the record of the case sent up by the court *in banc*. The record contained no transcript or summary of the evidence given at trial, nor even the reasons for the judgment of the court *in banc*. The Court of Error thus had no power to grant a new trial on the ground of misdirection of the jury or on the ground that the verdict of the jury was irreconcilable with the evidence.[15]

The Common Law Procedure Acts of 1852 and 1854 did away with the Writ of Error as a wholly new proceeding, and considerably enlarged the jurisdiction of the Court of Error on the new Memorandum of Error which took its place. It was given power to grant a new trial if the court *in banc* had not been unanimous in refusing it, and, in the case of misdirection, to give such judgment as the court *in banc* ought to have given. And where the trial judge had with the consent of the parties reserved leave to move the court *in banc* to enter a verdict contrary to that of the jury, the Court of Error was, by the Acts of 1852 and 1854, given the same powers as the court *in banc*. But the Court of Error could not, even after the Acts of 1852 and 1854, grant a new trial on the ground that the verdict of the jury was against the weight of the evidence.[16]

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[13] For fuller details, see O'Halloran, *op. cit.*, at pp. 52–7.

[14] He could not do it without: see the judgment of Lord Blackburn in *South Eastern Railway Co.* v. *Smitherman* (1883) 47 J.P. 773–4.

[15] A limited exception to this rule was where a party had embodied his objections to the judge's rulings on the effect or admissibility of evidence at trial in a Bill of Exceptions, which the judge had sealed and attached to the record of the case. In such a case, if these exceptions had not been made the basis of an application to the court *in banc* for a new trial, the party could rely on them in his writ of error.

It will therefore be seen from this brief review of the position before the Judicature Acts that there was very little scope for appellate review of the findings of fact of a common law court of first instance. Nor need this occasion any surprise, for it was a necessary consequence of the system of trial by jury in which the judgment of the court was normally based on a general verdict. The general verdict of a jury in most common law actions involves the application of a somewhat vague legal standard, such as we find in nuisance or negligence, to a believed set of facts; and since the jury, in returning a general verdict, does not and cannot be compelled to say what facts they have found to be true, the possibility of impeaching their application of the relevant standard are necessarily limited. In order to impeach the jury's verdict it was, and still is, necessary to show that it is unreasonable or perverse, *i.e.*, that the evidence at trial in support of the verdict, even if unchallenged, is not sufficient to justify the verdict, or else that it is contrary to the weight of the evidence.[17] And even in a case where it could be shown that the verdict was perverse in this sense, the power of the court was, and still is, limited. If the verdict is in favour of the plaintiff, the court may set it aside, and, if no new trial is ordered, give judgment for the defendant.[18] But if a verdict for the defendant is set aside, the court cannot substitute its own verdict for that of the jury, but can only grant a new trial.[19]

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[16] O'Halloran, *op. cit.*, at pp. 60–1.

[17] *Metropolitan Ry.* v. *Wright* (1886) 11 App.Cas. 152.

[18] *Allcock* v. *Hall* [1891] 1 Q.B. 444.

[19] *Mechanical & General Inventions Co.* v. *Austin* [1935] A.C. 346 at 369, 379. The reason why an appeal court cannot set aside a verdict for the defendant and substitute a verdict for the plaintiff is that the court cannot itself return a verdict, this being the proper function of

In the Court of Chancery the system of appeals was quite different from that at common law, and it is of some importance to consider what this system was because the new Court of Appeal established by the Judicature Acts was largely modelled on the Court of Appeal in Chancery, which was created in 1851. In a Chancery suit appeal lay from the judge who originally heard it to the Court of Appeal in Chancery, which consisted of the Lord Chancellor and two Lords Justices in Chancery,[20] and from the decision of the Court of Appeal in Chancery a further appeal lay to the House of Lords. A Chancery appeal always took the form of a rehearing of the suit, in which all the findings of the lower court were open to review. That Chancery appeals should have taken this form is explained by the fact that until 1852 there was in a Chancery suit no oral evidence of witnesses, the cause being decided upon affidavits and depositions in writing. On appeal, therefore, exactly the same evidence was presented as in the court below, and thus it was only to be expected that the appeal should take the form of a rehearing in which all questions of fact and law should be open to review. Even when, in 1852,[21] the practice of stating cases for the opinion of the common law courts was abolished and the Court of Chancery was empowered to decide such matters itself and to hear oral evidence, the form of appeal continued to be by way of rehearing, though it is clear that the appeal court was no longer, in every case, in as good a position as the trial court to review all the matters in dispute.

THE NEW COURT OF APPEAL

When, in 1875, the existing Court of Appeal was set up, with power to hear appeals from any of the newly established divisions of the High Court, the Rules of the Supreme Court provided that

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the jury. Where, however, a verdict for the plaintiff is set aside, the court is able to nonsuit the plaintiff and give judgment for the defendant without substituting another verdict. See Devlin, *Trial by Jury* (1956) Ch. 4 and pp. 170–3.

[20] The jurisdiction of the court could be exercised by any two members of the court or by the Lord Chancellor sitting alone: 14 & 15 Vict., c. 83, s. 11.

[21] By 15 & 16 Vict., c. 86, ss. 39, 61, 62.

all appeals should be 'by way of rehearing.'[22] The Rules also provided that the Court of Appeal should have power 'to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.'[23] It was at first provided that certain of the powers of the former common law courts *in banc,* such as hearing motions for new trials in jury actions, should be exercised by the newly constituted Divisional Courts, with a further appeal, by leave, to the Court of Appeal. But this was found to cause great delay and expense, and in 1890 it was provided that all motions for new trials should be brought directly to the Court of Appeal.[24]

Wide though these powers of the Court of Appeal are, they have not, as I have already indicated, substantially enlarged the powers of the court in a case of trial by jury. A jury still gives no reasons in support of a general verdict, and so an appeal court must perforce accept it unless it can be shown to be perverse in the sense described earlier.[25] As we shall see, it is on appeal from the findings of fact of a judge sitting alone that the powers of appeal courts have been enormously enlarged, and this enlarged power assumes great importance in view of the rarity nowadays of jury trials in common law actions.[26]

APPEALS FROM A JUDGE SITTING ALONE

It is in fact only within the last few years that the powers of an appeal court in relation to the findings of fact of a judge sitting alone have been finally settled.[27] Though the Court of Appeal decided when the Judicature Acts came into force that it was going to follow the practice of the Court of Appeal in Chancery,[28] which has been described above, it is obvious that an appeal in a common law action can only in a limited sense be by way of rehearing. It was never contemplated that the witnesses in a witness action should literally be reheard. All that the Court of Appeal ordinarily has before it is the documentary record of the oral evidence furnished by the judge's note or the shorthand note of the evidence. Consequently, it has long been established that a finding of fact by a judge sitting alone which turns on the reliability or credibility of oral testimony will rarely, if ever, be disturbed by an appeal court.[29] In respect of such matters a finding of fact by a judge sitting alone is practically as inviolable as the verdict of a jury.

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[22] R.S.C., Ord. 58, r. 3 (1) (formerly Ord. 58, r. 1).

[23] R.S.C., Ord. 58, r. 9 (3) (formerly Ord. 58, r. 4).

[24] Judicature Act, 1890, s. 1.

[25] 'A jury finds that the defendant has been negligent, and that is an end of the matter unless its verdict can be upset according to well-established rules': Viscount Simonds in *Benmax* v. *Austin Motor Co., Ltd.* [1955] A.C. 370 at 373.

[26] In 1955 only 35 actions were tried by common juries compared with 2,289 by judges sitting alone. The 35 actions tried by jury include those cases (libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise) in which trial by jury is obtainable as a matter of course. The decline in jury trial is not due to a jury being refused in those cases where it is discretionary. Very few applications are made, and those that are made are seldom refused. See Devlin, *Trial by Jury* (1956) pp. 130–3.

[27] For a review of the cases, see Goodhart, 'Appeals on Questions of Fact,' (1955) 71 L.Q.R. 402.

But the fact finding function of a jury in a common law trial is not confined to establishing what have been called the primary or specific facts of a case. As we have seen, it generally involves also the application of a legal standard to the specific facts found to exist. In an action of negligence, for example, it is the function of the jury to decide, not only what occurred, but also whether the defendant's conduct amounted to negligence. It is in relation to findings of fact by a single judge of this latter, evaluative sort that the powers of appeal courts were for a long time uncertain.

Whereas a jury, in returning a general verdict, does not and cannot be compelled to say what are the specific facts to which the relevant legal standard has been applied, a judge sitting alone invariably supports his decision by a reasoned judgment in which he sets out the specific facts which he has found to be established, and on which any inference, such as negligence, is based. Indeed, it has been suggested that he would fall short of his duty if he failed to do so.[30] It is clear therefore that on an appeal from a judge sitting alone an appeal court is not precluded from reviewing the trial judge's inferences from or evaluations of the specific facts in the way that it is precluded from reviewing the general verdict of a jury.

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[28] See *Colonial Securities Trust Co., Ltd.* v. *Massey* [1896] 1 Q.B. 38.

[29] *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243; *Watt* v. *Thomas* [1947] A.C. 484.

[30] Viscount Simonds in *Benmax* v. *Austin Motor Co., Ltd.* [1955] A.C. 370 at 373.

In a case at the beginning of the century Lord Halsbury, L.C., said that 'where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.'[31] And in *Mersey Docks & Harbour Board* v. *Procter,*[32] in 1923, Viscount Cave, L.C., said that it was the duty of a court of appeal in an appeal from a judge sitting alone 'to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly.'[33] But these statements did not settle the matter, for in a number of subsequent House of Lords' decisions involving questions of negligence it was said that where the question at issue on appeal is one that would fall within the province of a jury, had there been one, an appeal court should be slow to interfere with the findings of fact of a judge sitting alone.[34] A cynic might conclude that the different views expressed in these cases were not unrelated to the question whether the appeal judge actually agreed with the trial judge's findings in the particular case.[35] However, the matter appears to have been put beyond doubt by the recent case of *Benmax* v. *Austin Motor Co. Ltd.,*[36] in which the House of Lords came down finally in favour of the view that where there is no question of the credibility or reliability of witnesses, and . . . where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.'[37] And the House of Lords itself has not been slow to exercise these powers, for in at least two actions of negligence since *Benmax* v. *Austin Motor Co. Ltd.* the House of Lords has substituted its own evaluation of the facts for that of the trial judge.[38]

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[31] *Montgomerie & Co., Ltd.* v. *Wallace-James* [1904] A.C. 73 at 75.

[32] [1923] A.C. 253.

[33] *ibid.,* at p. 258.

[34] *Glasgow Corporation* v. *Muir* [1943] A.C. 448 at 454; *Bolton* v. *Stone* [1951] A.C. 850 at 859, 862.

[35] See *Caminer* v. *Northern and London Investment Trust Ltd.* [1951] A.C. 88; *King* v. *Phillips* [1953] 1 Q.B. 429; *Blackman* v. *Railway Executive* [1954] 1 W.L.R. 220 at 221; *Cuttress* v. *Scaffolding (GB) Ltd.* [1953] 1 W.L.R. 1311; *Lewis* v. *Carmarthenshire C.C.* [1953] 2 All E.R. 1403 at 1407.

[36] [1955] A.C. 370.

The question whether on proved facts a defendant has been negligent involves a value judgment, and since this judgment is a legal one few will deny that an appeal court is in as good a position as the trial judge to form such a judgment if the specific facts are not in dispute. But it by no means follows from this that it is desirable for every appeal court to review the opinion of a lower court on such a question. Dogmatic statements by appeal courts that the judgment appealed from was 'wrong' on a question of this sort merely obscure the evaluative process involved in the judgment. Questions of negligence are decided, or profess to be decided, by reference to the conduct of a reasonable man, but the latter is merely an abstraction and we have no fixed standard that can be referred to in case of dispute. If we say that the trial judge was wrong and the House of Lords right on an issue of this sort, it is doubtful whether we are saying more than that the House of Lords differed from the trial judge and that there is no appeal from the House of Lords.

The general interest of society in the predictability of the law cannot be invoked to justify appeals on questions of this sort, and therefore, as I have said, the right to appeal needs to be justified as being in the true interests of the parties. One has to consider the interests of both parties, and not merely the interests of the one who ultimately succeeds on appeal. Every appeal which is allowed must, under our present rules as to costs,[39] work injustice, since the loser is compelled to pay for the mistakes of the court below. If the judgment appealed from is consistently upheld, the hardship is less obvious, though the successful party is likely to be considerably out of pocket in the matter of costs actually incurred, particularly if his opponent is legally aided. And even his unsuccessful opponent deserves a little sympathy for having been encouraged to take his case so far, particularly when he is told by the House of Lords that the issue involved is of the kind that would have fallen within the province of a jury, had there been one.[40] It has often been remarked that our present rules as to costs, whereby a successful appellant can normally expect to get his costs, not only of the appeal, but also of the proceedings in the courts below, have a tendency to encourage appeals by magnifying the gambling element in them as the costs accumulate, with the result that the original issues are sometimes lost sight of, the real issue at stake being the question of costs. It may be doubted whether it would not be fairer to the parties and more in the public interest to revert to the rule followed by the courts before the Judicature Acts, according to which, in the case of a successful appeal, each party bore his own costs of the appeal, the successful appellant getting the costs of the original trial which ought, *ex hypothesi,* to have been in his favour.[41]

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[37] *ibid.*, at p. 376, *per* Lord Reid.

[38] *Carmarthenshire C.C.* v. *Lewis* [1955] A.C. 549; *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.* [1956] A.C. 552.

[39] The costs are in the discretion of the court (Judicature Act, 1925, s. 50 (1); R.S.C., Ord. 58, r. 9 (5)), but soon after the Judicature Acts came into force the new Court of Appeal announced that the costs would ordinarily follow the event of an appeal and this has been the general practice ever since: see (1875) 1 Ch.D. 41.

That parties do in fact so frequently avail themselves of the right to appeal is therefore not to be taken as showing that the existing system of appeals is in the interests of the average litigant. Some evidence that litigants do not really like appeals, on questions of fact at least, is to be found, I think, in the growing preference of businessmen and others to submit their disputes to arbitration rather than take them to the courts. By means of arbitration clauses in contracts many important classes of business have been almost completely withdrawn from the courts.[42] As the late Lord Cooper once pointed out,[43] a barrister whose services as an arbitrator are much in demand while he is at the Bar is likely to lose all his clients if he appointed to the Bench, even though most of the facilities, such as the arbitrator himself, a clerk and accommodation, which they previously had to pay for, are provided virtually free of charge. I do not suggest that the possibility of appeals is the sole, or even the chief, factor deterring people from using the ordinary courts. But the fact remains that from an arbitrator's award there is no appeal on a question of fact, and that great numbers of people show a preference for such a system.

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[40] *Bolton* v. *Stone* [1951] A.C. 850 at 862, *per* Lord Normand.

[41] *Young* v. *Moeller* (1856) 6 E. & B. 681; *Denny* v. *Hancock* (1870) 40L.J.Ch. 193.

[42] *e.g.*, insurance, bills of exchange, charter parties, and many other kinds of contracts where standard forms are used.

[43] 'Defects in the British Judicial Machine,' (1953) *Journal of the Society of Public Teachers of Law,* Vol. 2 (new series), 91, at pp. 92–3.

APPEALS ON QUESTIONS OF FACT AND THE BURDEN OF PRECEDENT

Appeals on questions of fact, particularly when they are carried to the House of Lords, add a great deal of largely useless matter to the ever-growing burden of precedent. With the passage of years and the accumulation of law reports more and more of the courts' time is taken up with sifting and considering the precedents which counsel think relevant to the matter in issue. This adds considerably to the length, and so the cost, of both trials and appeals, especially as reported judgments tend to become longer and longer. It has, for example, been estimated that a given type of case in the 1870's occupied roughly a third of the time, and involved only a fraction of the cost, that it would do today.[44] The reporting of decisions which do not materially assist future courts is therefore to be deplored, and nearly all decisions on questions of fact fall into this category. It is true that the editors of law reports are largely to blame for reporting decisions which turn simply on questions of fact, but the law reporter is concerned to provide the best service for his customers and he may, I suggest, be forgiven for assuming, as he usually does, that a case reviewed by the House of Lords, even if it involves only a question of fact, must be of sufficient importance to warrant reporting it.

The futility of reporting such cases is well illustrated by the recent decision of the House of Lords in *Morris* v. *West Hartle-*

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[44] Lord Cooper, *ibid.*, at p. 94.

pool Steam Navigation Co. Ltd.,[45] which was judged sufficiently important to be reported in the Law Reports. The question at issue was whether shipowners were liable in negligence to a young seaman who fell through an open and unfenced hatch into the hold of a ship. That the defendants owed the plaintiff a duty to take reasonable care for his safety was not in dispute, and the successive appeals turned solely on the question whether the specific facts found by the trial judge to exist gave rise to an inference of negligence. The case first came before Streatfield, J., who held that the defendants were negligent. The Court of Appeal, by a majority, set his judgment aside, holding that they were not.[46] The House of Lords, again by a bare majority, restored the judgment of Streatfield, J.[47] The report of the case in the House of Lords occupies twenty-eight pages of the Law Reports, much of it taken up with extracts from the transcript of evidence given at the trial. There was no difference of principle between the majority and minority of the House, nor apparently between any of the judges who heard the case, and no principle can be extracted from it which was not already well established, as can be seen from the headnote of the report. Questions of the sort in issue in this case involve, as we have seen, an evaluation of the specific facts, which often, as the decision shows, gives rise to differences of judicial opinion. It is difficult to avoid the conclusion that the outcome of the case may have depended on the particular composition of the ultimate appeal court, in much the same manner as the verdict of a jury sometimes depends on its particular composition. There would seem to be little more point in reporting the decision of the House of Lords in such a case than in reporting a jury's verdict.

Another unfortunate consequence of entertaining appeals on questions of fact is the tendency of appellate judges, when dealing with the facts of a particular case, to particularise the duty owed by the defendant in terms which often suggest that the court is laying down general propositions of law.[48] For example, in *Baker* v. *E. Longhurst & Sons Ltd.*,[49] an appeal in a 'running-down' case, Scrutton, L.J., appeared to lay down as a general principle that a person driving in the dark must be able to pull up within the limits of his vision. Though this particular principle was soon repudiated by Lord Wright on the ground that each case is unique and it is impossible to extract any general principle of law from such decisions,[50] and though many distinguished judges have deprecated in strong terms this tendency of 'exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense,'[51] the practice has nevertheless continued. The effect of it is, in the law of negligence, to particularise the duty of care in respect of different situations in a manner which is often artificial and which, while adding considerably to the bulk of precedent, does little or nothing to make the application of the law more certain and predictable. As Lord du Parcq once observed, 'it is a grave error to suppose that guidance is necessarily to be found in a case where a passenger has fallen through a carriage door-way by referring to all the other cases in the books in which passengers have fallen through carriage doorways.'[52]

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[45] [1956] A.C. 552.
[46] [1954] 2 Lloyd's Rep. 507.
[47] [1956] A.C. 552 (Lords Reid, Tucker and Cohen; Lords Morton of Henryton and Porter dissenting).

A good illustration of this tendency to elevate a course of reasoning appropriate to a particular case into a general proposition of law is to be found in the House of Lords' decision in

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[48] See Street, *Law of Torts* (1955), pp. 123–4, 127–30. The tendency of appeal courts to particularise the duty of care owed by a defendant in a particular case obscures the extent to which the courts review the sort of questions that would fall within the province of a jury. In *Caminer* v. *Northern and London Investment Trust Ltd.* [1951] A.C. 88, for example, where a rotten elm tree on the defendant's land had fallen into the highway, injuring the plaintiff, Lord Porter posed himself the question whether as a matter of law there was a duty to lop middle-aged elm trees. Posed in this form, any jury question other than the finding of specific fact can be converted into a question of law. It is, perhaps, arguable that the traditional distinction between questions of law and questions of fact, which was evolved in relation to jury trial, has lost much of its meaning in the modern law.

[49] [1933] 2 K.B. 461 at 468.

[50] *Tidy* v. *Battman* [1934] 1 K.B. 319 at 322.

[51] *Easson* v. *L.N.E. Ry. Co.* [1944] K.B. 421 at 426 (du Parcq, L.J.); see also *Morris* v. *Luton Corporation* [1946] K.B. 114 at 115 (Lord Greene, M.R.).

[52] *Easson* v. *L.N.E. Ry. Co.* [1944] K.B. 421 at 426.

Bolton v. *Stone,*[53] the cricket ball case. The plaintiff there, while standing in the road outside a cricket field, was injured by a ball struck out of the ground. There was evidence that balls had been struck into the road on very rare occasions in the past, but no one had previously been injured in such a way during the ninety years that the ground had been used. The plaintiff's action for damages against the committee and members of the club came on before Oliver, J., who held that the defendants were not negligent and that nuisance had not been established.[54] The Court of Appeal, by a majority, reversed his judgment, on the ground that there was a foreseeable risk of a ball being hit into the road and the defendants had failed to take reasonable care to avoid injury to a person standing in the road.[55] The House of Lords unanimously restored Oliver, J's original judgment in favour of the defendants.[56]

This is, I think, as good an example as any of the sort of question which should not be open to review on successive appeals, for the reasons already given. As Lord Normand pointed out in the House of Lords, the question at issue was 'one eminently appropriate for the decision of a jury.'[57] What, however, I am particularly concerned with here are the grounds on which the decision of the House of Lords was based. The case was clearly a border-line one, on which it is difficult to justify a decision, either for the plaintiff or the defendants, on any strong ground. If I myself, as judge or juryman, had been called upon to justify non-suiting the unfortunate Miss Stone, I think I would have said that playing cricket is such commendable activity, the risk of serious injury to any one outside the ground so remote, and the cost of erecting the sort of fence which would prevent a ball from ever going out of the ground so prohibitive, that the defendants could not in all the circumstances of the case be said to have been guilty of negligence in failing to guard against the slight risk of injury to people standing in the road. And this was, substantially, the reason given by Lord Radcliffe.[58] Such a course of reasoning recognises that the decision depends on all the circumstances of the case, and does not involve any principle of far-reaching importance.

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[53] [1951] A.C. 850.
[54] [1949] 1 All E.R. 237.
[55] [1949] 2 All E.R. 851.
[56] [1951] A.C. 850.
[57] *ibid.*, at p. 862.

But in the opinions of the majority of the House in *Bolton* v. *Stone* the decision in favour of the defendants was made to turn solely on a curious distinction between the foreseeable possibility and the foreseeable probability of injury resulting. 'The standard of care in the law of negligence,' said Lord Oaksey,[59] 'is the standard of the ordinary careful man, but, in my opinion, an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen.' Similarly, in the opinion of Lord Normand, it was not sufficient 'for the respondent to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people in the road. She must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.'[60] And Lord Reid, too, thought that a duty of care was based 'rather on the likelihood of damage to others than on its foreseeability alone.'[61]

As general propositions of law, which they profess to be, these dicta are, as I have suggested elsewhere,[62] highly dubious. No one denies that the likelihood of injury occurring is an important fact bearing upon the standard of care expected of a reasonable man, and, on the particular facts of *Bolton* v. *Stone,* it was perhaps natural that this factor more than any other should have been seized upon as bearing upon the outcome of the case. But this does not warrant the general proposition that there can never be a duty of care to guard against risks which are merely foreseeable possibilities. It is clear that many factors in a situation other than the mere likelihood of injury occurring affect the standard of care required of a person. Among the more obvious of these is the ease with which a particular risk can be avoided.[63] The standard of care in the law of negligence, as Lord Oaksey himself said, is the standard of a reasonable man, and it can hardly be doubted that a person may be guilty of negligence in failing to guard against a foreseeable risk of injury to others, remote though it may be, if that risk could have been avoided at no cost or inconvenience to himself.

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[58] *ibid.*, at pp. 868–9: 'Unless there has been something which a reasonable man would blame as falling beneath the standard of conduct which he would set for himself and require of his neighbour, there has been no breach of legal duty. . . . It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called on either to abandon the use of the ground for cricket or to increase the height of the surrounding fences. He would have done what the appellants did. In other words, he would have done nothing.'

[59] *ibid.*, at p. 863.

[60] *ibid.*, at p. 861.

[61] *ibid.*, at p. 865.

[62] 'The Tort of Negligence,' (1953) 6 *Current Legal Problems*, p. 236, at pp. 246–9.

Some support for this criticism of the reasoning in *Bolton* v. *Stone* is to be found in an even more recent decision of the House of Lords, *Carmarthenshire County Council* v. *Lewis,*[64] in which the effect of *Bolton* v. *Stone* was raised. A small boy of four, a pupil at a nursery school maintained by the Council, wandered out of the school grounds into the road and there caused the driver of a lorry to swerve and collide with a telegraph pole. The driver was killed, and his widow brought an action for damages against the Council. It is not necessary here to enter into the detailed facts of the case, except merely to state that the death of the lorry-driver could not be said to be a very probable consequence of any alleged negligence on the part of the defendants.[65] The House of Lords held, nevertheless, that the Council was liable. Counsel for the defendants not unnaturally relied upon *Bolton* v. *Stone,*[66] arguing that though injury to the driver of a vehicle in the street might have been foreseen as a possible consequence of the escape of the child, yet it was not reasonably probable, and therefore the Council was not liable. But this argument did not prevail upon the House. Indeed, the only member of the House who considered it at all was Lord Reid, who, as we have seen, was one of the judges in *Bolton* v. *Stone,* and his explanation of the case is hardly consistent with the extracts from it already quoted. The effect of *Bolton* v. *Stone,* he said, was 'if an event is foreseeable, the antithesis of its being reasonably probable is that the possibility of its happening involves a risk so small that a reasonable man would feel justified in disregarding it,'[67] and he then went on to say that the risk involved in the case before him was not such as a reasonable man would disregard. Though the logic of this antithesis is open to question,[68] it is clear that he thought the substantial issue was whether the risk in question, be it probable or remote, was one which a reasonable man would in the circumstances guard against, a view which, although eminently sensible, is, as I have said, hardly reconcilable with the actual judgments in *Bolton* v. *Stone.*

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[63] Other relevant factors include the gravity of the risk and the utility of the defendant's conduct. See *Paris* v. *Stepney Borough Council* [1951] A.C. 367 and *Daborn* v. *Bath Tramways Motor Co.* [1946] 2 All E.R. 333.

[64] [1955] A.C. 549.

[65] Romer, L.J., in the Court of Appeal thought that 'almost superhuman vision' would have been required to foresee such an accident: [1953] 2 All E.R. 1403 at 1407.

[66] [1951] A.C. 850.

THE NEED FOR FINALITY OF DECISIONS

It is difficult to avoid the conclusion that our appeal courts, and especially the House of Lords, in reviewing the findings of a trial judge to the extent I have described, have tended to overlook the general interest in finality of decisions. The administration of justice is, or should be, a social service, but, as the late Lord Cooper recently remarked,[69] the courts are no longer offering the sort of service which the community requires. Nor can the courts afford to be indifferent in this matter, for there are other competitors in the field, as is shown by the growth of arbitration and the establishment of statutory tribunals. In 1948 the whole field of workmen's compensation was taken out of the hands of the ordinary courts and entrusted to special statutory tribunals, and what has happened to workmen's compensation may one day happen to other classes of claim, such as 'running-down' claims and industrial injury claims, which nowadays occupy so much of the time of the courts.

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[67] [1955] A.C. 549 at 565.

[68] If an event is foreseeable, the antithesis of its being reasonably probable is that it is improbable though still foreseeable. Whether or not a reasonable man would feel justified in disregarding an improbable though foreseeable risk would depend on the circumstances of the case.

[69] *loc. cit.,* at p. 93.

The sort of finality which is needed was provided in earlier times by the verdict of a jury, for the reasons already given. It is sometimes contended that judges sitting alone are likely to be more consistent than juries in applying legal standards such as reasonableness and that this makes for greater certainty and predictability in the law. This view is expressed, for example, by Sir Patrick Devlin, in his recent Hamlyn Lectures on Trial by Jury. After remarking on the fact that most of the cases which now come before the common law courts are either 'running-down' claims or actions by workmen against their employers, he says that 'whenever cases about carelessness belong to a type, it is inevitable that there should also grow up a typical standard of care; it is not something that can be put into a formula which the jury can be told to apply; it depends upon a knowledge of the sort of approach that is generally made to cases of the type.'[70] He suggests that 'if a case belongs to a type, it is obvious that the result of the trial can be predicted with much greater confidence if it is taken before a judge alone than before a jury.'[71]

But the greater consistency of judges, as compared with juries, in interpreting legal standards has not, as we have seen, deterred appeal courts from claiming powers of review on an appeal from a judge sitting alone which they have never been able to exercise in appeals from trial by jury. The extraordinary result is, therefore, that the findings of fact of a judge sitting alone are open to review in precisely those matters, such as interpretation of standards, on which his judgment is likely, so it is claimed, to be superior to that of a jury; while it is not open to review on matters such as credibility of witnesses in respect of which his judgment, as compared with that of a jury, is most likely to be faulty.

It is doubtful, moreover, whether the greater consistency of judges than juries in interpreting standards in cases of a particular type does in fact make the outcome of cases appreciably more predictable. The outcome of most common law actions depends on the application of a legal standard to a set of facts found to exist, and so long as the specific facts are in dispute, as they generally are, consistency in the interpretation of standards can do little to make the outcome of cases more predictable.

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[70] *op. cit.*, at p. 142.

[71] *op. cit.*, at p. 144.

Absolute consistency in the interpretation of standards is, in any case, a questionable ideal. The traditional role of the jury in English law, as Sir Patrick Devlin himself recognises,[72] has been to preserve an element of *aequum et bonum* in both the civil and criminal law. Within the limits allowed by the judges a jury is free to decide a case on its merits and take account of factors which a judge sitting alone might regard as irrelevant or improper. Judges have frequently recognised this, and even at times applauded and connived at it.[73] Hard cases, it is said, make bad law, and a judge sitting alone is likely to take heed of this. But hard cases tried by a jury do not make law at all, for a jury is not called upon to give reasons for its verdict. The principle is kept intact while the jury do justice in the particular case by not applying it. A system of trial by a judge sitting alone is bound to lead to a narrowing of this discretion. Because of his training, experience and greater detachment, he is not likely to allow himself, consciously at least, to be influenced to the same extent by considerations which weigh with juries, and he is, moreover, expected to give a reasoned judgment in support of his decision. But judges are made of the same human stuff as jurymen, and are undoubtedly moved, though to a lesser extent, by many of the same considerations. I doubt whether it is either possible or desirable to exclude altogether an element of *aequum et bonum* from the judicial interpretation of standards. Indeed, it may be contended that this is precisely what standards are for. Consistency in the interpretation of standards is therefore an illusion, and if judges hold themselves out as being absolutely consistent in the interpretation of standards, they are likely, I think, to be deceiving both themselves and others.

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[72] *op. cit.*, at pp. 152–8.

[73] Thus Lord Goddard, C.J., in giving evidence before the Royal Commission on Capital Punishment, 1949–53, said: 'I think a jury can always be trusted to do justice where it might be impossible to bring the case strictly within the M'Naghten Rules': Cmd. 8932, p. 82.

CONCLUSIONS

I have tried to show in this article that no useful purpose is served by appeals on questions of fact which justifies the expense, delay, anxiety, and injustice which they necessarily involve. The spectacle of judges convicting each other of error as readily as they do, and often with such lack of unanimity, is unedifying to say the least. One way of excluding appeals of this sort would be to restore the jury in all common law actions, and there is little doubt that the practical finality of a jury's verdict would often result in an ultimate saving of costs. But juries have their limitations as instruments for fact finding, especially in involved cases, and I do not see why it should be necessary to resort to such an extreme. The popularity of arbitration and the fact that litigants often elect to have their cases tried by a judge sitting alone even when they have the right to ask for a jury suggest that most people are content to abide by the decision of a single judge.

No convincing reason has ever been put forward to explain why the findings of fact of a judge sitting alone should be more open to review in an appeal court than the verdict of a jury. To say, as the courts have done, that an appeal court is in as good a position as the trial judge to apply a standard to the specific facts is merely to explain how it is that appeal courts are able to review such matters. It does not provide any justification for their doing so. The ability to interfere is, as we have seen, an accidental result of the fact that the judge does, while the jury does not, give a reasoned judgment.

It is probably too late now to expect the House of Lords to adopt any self-denying ordinance in this matter, and one must therefore look to the legislature for reform. For myself, I should like to see all appeals on questions of fact abolished and the judgment of a judge sitting alone vested with the same finality as attaches to the verdict of a jury. If this be thought too extreme a remedy, the very least reform that would seem to be indicated is to abolish appeals on questions of fact to the House of Lords. The majority verdict of a distinguished jury of five Law Lords on a question of negligence is a luxury which most litigants can ill afford.

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RECENT CHARTERPARTIES

E. R. HARDY-IVAMY

IN recent charterparties although some cases have concerned matters of fact alone, the primary problem has been one of construction. Since the beginning of the century the forms of charterparties have become increasingly standardised, and where a clause in a charterparty is interpreted in a particular way the same construction is likely to be adopted in the future in another charterparty.

Accordingly the purpose of this paper is to trace the development of this branch of the law in the light of the cases reported since 1946. The principal matters[1] that have had to be decided by the courts relate to five topics: (1) loading and discharge; (2) the voyage; (3) time charterparties; (4) demurrage; and (5) freight.

LOADING AND DISCHARGE

Where a charterparty is entered into, it usually relates to one ship only. A new clause, however, concerning the right to substitute another vessel has come before the courts. The object of adding such a clause is to make sure that a mere accident to one particular ship is not necessarily going to bring the charterparty to an end, if the owners have at their disposal another identical ship which can do the work just as well. Thus a liberty to substitute a vessel of similar size 'at any time before or during the charterparty' entitled the owners to substitute ships from time to time, and did not bind them to make one substitution only.[2]

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[1] Other matters were considered in the following cases in the period under review: *O/Y Wasa S.S. Co.* v. *Newspaper Pulp & Wood Exports* (1949) 82 Ll.L. Rep. 936 (agency–'disponent owners'); *Frota Nacional de Petroleiros* v. *Skibs Aktieselskapet Thorsolm* [1957] 1 Lloyd's Rep. 1 (arbitration clause); *Sociedade Portuguesa de Navios Tanques* v. *Hvalfangerselskapet Polaris A/S* [1952] 1 Lloyd's Rep. 407, C.A. (negotiations subject to signature of formal charterparty); *Zarati S.S. Co., Ltd.* v. *Frames Tours Ltd.* [1955] 2 Lloyd's Rep. 278 (negotiations between shipbrokers prior to signing of contract). *Federazione Italiana dei Consorzi Agrari* v. *Federal Commerce & Navigation Co.* (1949) 82 Ll.L. Rep. 717 (claim for rectification of charterparty); *The Assunzione* [1954] P. 150 (conflict of laws); *Nello Simona* v. *A/S M/S Straum* (1949), 83 Ll.L. Rep. 157 (arbitration).

A shipowner usually agrees to grant the charterer 'the full reach and burthen of the steamer.' Where the relevant clause so states, but adds 'provided same are not occupied by bunker coals,' the charterer must at least establish that the space could not reasonably be required for bunkers to be consumed on the voyage, in order to claim that it should be made available to him.[3]

Where there is more than one port of loading and different kinds of cargo may be loaded at the option of the charterer, the charterer is entitled to cancel the contract if he can show that the shipowner would necessarily be unable to comply with his obligation to load some cargo which the charterer might validly call on him to take on board at the first or some subsequent port.[4]

Where a cargo owner claims that there is still room to load more cargo, provided the master has applied his mind reasonably and properly to the matter, his judgment that the ship is already fully loaded ought not lightly to be overthrown.[5]

Sometimes the charterparty provides that the vessel is to be ready to load by a particular date. Another provision is that 'she is expected ready to load' at a certain date; but such expectation must be based on reasonable grounds.[6] But where a shipowner wants to make the beginning of one voyage dependent upon the conclusion of the one before under another charterparty, he must say so in clear terms, and cannot deprive the charterer of his right to repudiate merely by the use of the words

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[2] *S.A. Maritime et Commerciale of Geneva* v. *Anglo Iranian Oil Co., Ltd.* [1954] 1 W.L.R. 492, C.A.

[3] *Noemijulia Steamship Co., Ltd.* v. *Minister of Food* [1951] 1 K.B. 223, C.A.

[4] *ibid.*, See also *A/S D/S Heimdal* v. *Questier & Co., Ltd.* (1949) 82 Ll.L. Rep. 452.

[5] *A/S D/S Heimdal* v. *Questier & Co., Ltd.* (1949) 82 Ll.L. Rep. 452 at 470 (*per* Morris, J.) (full and complete cargo of okoume logs).

[6] *Sanday & Co.* v. *Keighley, Maxted & Co.* (1922) 27 Com.Cas. 296; *Finnish Government (Ministry of Food)* v. *H. Ford & Co., Ltd.* (1921) 6 Ll.L. Rep. 188; see further 'Expected and Scheduled Dates of Voyages' (1956) 106 *Law Journal* 211 by the present writer.

'expected ready to load,' in a case where the vessel is delayed on the previous voyage.[7]

It is a matter of construction whether a failure to load amounts to a breach of warranty or to a breach of condition entitling the charterer to rescind. A party to a contract may not purchase indefinite delay by paying damages and a charterer may not keep a ship indefinitely on demurrage. Devlin, J., has recently stated that the yardstick by which this length of delay is to be measured is such delay as would frustrate the charterparty.[8]

The goods shipped by the charterer must come within the contractual description contained in the charterparty. Thus, in a case concerning an oil carrying charterparty it was held that no breach of contract had been committed when butanised crude oil was loaded, for this cargo fell within the contractual description of 'crude oil.'[9]

If the charterparty provides that only 'lawful merchandise' is to be conveyed in the vessel, this means that the goods loaded must be such as can be loaded without breach of the law in force at the port of loading. But it must also be the type of cargo which can be lawfully carried and discharged at the port to which the charterer has ordered the ship to proceed.[10]

Where a clause in a charterparty stated that the charterer was not to load 'explosives, arms, ammunition, or other dangerous cargo,' these words were held to include the shipment of turpentine which was dangerous, even though not similar to the types of cargo specified.[11] Devlin, J., refused to apply the *ejusdem generis* rule, and said that a rule of construction could not be more than a guide to enable the court to arrive at the true meaning of the parties. The *ejusdem generis* rule meant that there was implied into the language which the parties had used words of restriction which were not there. It could not be right to approach a document with the presumption that there should be such an implication. To apply the rule automatically in that way would be to make it the master and not the servant of the purpose for which it was designed, namely to ascertain the meaning of the parties from the words they had used. The main argument of construction that justified the application of the rule did not apply in commercial documents.

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[7] *Evera S.A. Comercial* v. *North Shipping Co.* [1956] 2 Lloyd's Rep. 367.

[8] *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 Q.B. 401. For further proceedings see [1957] 2 Lloyd's Rep. 311.

[9] *Atlantic Oil Carriers Ltd.* v. *British Petroleum Co., Ltd.: The Atlantic Duchess* [1957] 2 Lloyd's Rep. 55.

[10] *Leolga Compania de Navigacion* v. *John Glynn & Son Ltd.* [1953] 2 Q.B. 374.

[11] *Chandris* v. *Isbrandtsen-Moller Co., Inc.* [1951] 1 K.B. 240.

If there has been a fundamental breach in loading cargo outside the contractual description, *e.g.*, by loading dangerous cargo, the shipowner may repudiate the contract or choose to affirm it.[12] Possibly, although the master accepts the cargo with knowledge of its contents, the owner can still tear up the whole contract, though this principle might result in some practical inconvenience.[13]

The expenses incurred in discharging the cargo may be governed by the custom of the port. Thus, at Cork, where a bulk cargo of grain is discharged otherwise than by suction direct into a silo, the consignee carries out the work of bagging the cargo, and half of the cost incurred is borne by the ship.[14]

THE VOYAGE

A common term in charterparties is that a vessel is to be directed only to a safe port. In each case it is a question of fact whether or not a port is a safe one.[15] Even if a port is safe notwithstanding that a ship has to leave it in bad weather, it is not safe unless there is a reasonable chance of the ship being warned and being able to leave in safety.[16] The charterer does not guarantee that the most direct or any particular route to the port is safe, but the voyage which he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety.[17] Where instead of the word 'port' the words 'approved loading place' are used, they mean approved generally in the trade or business.[18]

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[12] *ibid.*

[13] *ibid.*, at p. 252 (*per* Devlin, J.).

[14] *A/S Sameiling* v. *Grain Importers (Eire) Ltd.* [1952] 1 Lloyd's Rep. 313.

[15] *Stag Line Ltd.* v. *Ellerman & Papayanni Lines Ltd.* (1949) 82 Ll.L. Rep. 826 (underwater obstruction at Naples); *G. W. Grace & Co., Ltd.* v. *General Steam Navigation Co., Ltd.* [1950] 2 K.B. 383 (ice in approaches to Hamburg); *Compania Naviera Maropan S/A.* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68, C.A. (gale at 'Tommy's Arm' in Newfoundland); *Reardon Smith Line Ltd.* v. *Australian Wheat Board* [1956] A.C. 266, P.C. (no hauling-off buoy at Geraldton); *Leeds Shipping Co., Ltd.* v. *Société Française Bunge* [1957] 2 Lloyd's Rep. 153 (bad weather at Mogador).

[16] *Leeds Shipping Co., Ltd.* v. *Société Française Bunge* (*supra*).

In *Reardon Smith Line Ltd.* v. *Australian Wheat Board*[19] the Privy Council considered the legal effect of ordering a vessel to an unsafe berth. Lord Somervell of Harrow observed[20]: 'The charterer is given a choice within limits prescribed as to where he will have his cargo available for loading. It seems natural that he should give at any rate some undertaking as to its safety and that the owners should be entitled to rely on the place nominated being safe. If he breaks his undertaking and nominates an unsafe port and the ship is damaged through going there, he will be liable for the damage, subject of course to possible questions of remoteness,[21] or *novus actus interveniens*.' One question left open by their Lordships was as to the position if at the time of nomination the port would, so far as could be foreseen, be safe for the vessel when loading, but become unsafe later through circumstances unforeseeable by the charterer.[22]

The parties may, of course, agree that their rights to recover damages shall be limited. But in a case where the charterparty stated 'indemnity for non-performance of this charterparty proved damages not exceeding estimated amount of freight,' the court held that the clause was not sufficiently clear so as to limit the damages caused by entering an unsafe port.[23]

[17] *G. W. Grace & Co., Ltd.* v. *General Steam Navigation Co., Ltd.* [1950] 2 K.B. 383 at 39 (*per* Devlin, J.).

[18] *Compania Naviera Maropan S/A.* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68 at 85 (*per* Singleton, L.J.).

[19] [1956] A.C. 266, approving the decision of the Court of Appeal in *Compania Naviera Maropan S/A.* v. *Bowaters Pulp and Paper Mills Ltd.* (*supra*).

[20] [1956] A.C. 266 at 279.

[21] See *e.g.*, *Compania Naviera Maropan S/A. v. Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68 at 78: 'A master, who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic, because he had not cared to risk damage to his paintwork' (*per* Devlin, J.).

[22] But see *Compania Naviera Maropan S/A.* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68 at 105.

[23] *Leeds Shipping Co., Ltd.* v. *Société Française Bunge* (*supra*).

A charterer, who has the right to nominate a berth and has actually done so, is not entitled to alter the nomination. If he does so, he will be liable for any loss to the shipowner resulting from the master taking the ship to the new berth.[24]

A general rule of construction is that the words used in a charterparty, being a commercial document, are to be construed in a commercial rather than a legal sense. Thus where a ship had liberty to comply 'with any orders of any Government,' and if in compliance with such orders anything was done or not done, that was not to be deemed a deviation, the court interpreted the word 'Government' as not meaning merely a Government recognised *de facto* or *de jure* by the Foreign Office. But the qualities or character required by the body giving the order included essentially the exercise of full executive or legislative power over an established territory.[25]

Charterparties sometimes expressly regulate the position as to expenses incurred during the voyage. Where part of the freight had to be paid 'in sufficient cash for vessel's ordinary disbursements,' this was held to include the cost of employment of ship's agents in a foreign port. But the term did not cover the payment of dispatch money,[26] for that was not a sum disbursed for the purpose of enabling the vessel to perform her service under the contract.[27] Where the charterer is to be liable for 'any expense' incurred by the shipowner 'in shifting, discharging or reloading any cargo for the purpose of putting the vessel into seaworthy trim,' 'any expense' will include the stevedore's bill, the charges of the port authority in shifting the ship and the crew's overtime, but not compensation for delay to the ship. 'Expense' means money spent out of pocket and not loss of time.[28]

If there is in a charterparty a clear and express warranty of seaworthiness, the shipowner can only be excused from responsibility for any damage caused by breach of that term if there is an exemption or stipulation absolving him from an undertaking which is clear, express and without ambiguity. There must be clear, express and unambiguous words in order to escape from that very clear obligation.[29] Thus a clause stating that the 'ship [was] not answerable for losses through . . . any latent defect in the machinery or hull not resulting from want of due diligence by the owners' was held not to exempt them from liability for unseaworthiness by reason of any latent defect existing at the commencement of the chartered voyage.[30]

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[24] *Anglo-Danubian Transport Co., Ltd.* v. *Ministry of Food* [1949] 2 All E.R. 1068.

[25] *Luigi Monta of Genoa* v. *Cechofracht Co., Ltd.* [1956] 2 Q.B. 552.

[26] See further *'Themistocles' (Owners)* v. *Compagnie Intercontinentale de L'Hyperphosphate of Tangier* (1949) 82 Ll.L. Rep. 232.

[27] *Dene Shipping Co., Ltd.* v. *Mann George & Co., Ltd.* (1949) 82 Ll.L. Rep. 846. Money paid by the owners to stevedores for discharging the cargo would presumably come within the meaning of the term, but in the instant case the duty of effecting the discharge of the cargo was imposed on the consignees by the terms of the contract.

[28] *Chandris* v. *Union of India* [1956] 1 W.L.R. 147, C.A.

In the case of a consecutive voyage charterparty a clause that a vessel was to be 'in every way fitted for the voyage and maintained in such condition during the voyage, perils of the sea excepted' was construed as meaning that the obligation to provide a seaworthy vessel applied at the commencement of each of the voyages, and that the ship was to be maintained in such condition throughout every voyage. Where such a charterparty contained a clause stating: 'Paramount Clause. This bill of lading shall have effect subject to the United States Carriage of Goods by Sea Act, 1936' (which, if effective, would have reduced the shipowner's obligation to the mere exercise of due diligence to make the ship seaworthy), the Court of Appeal held that the clause was to be rejected *in toto* as insensible.[31] But this decision was reversed by the House of Lords.[31a] Viscount Simonds considered that the parties, when they agreed that the paramount clause as attached should be incorporated in their agreement, and proceeded physically to attach it, had a common meaning and intention, which compelled him to regard the opening words 'this bill of lading' as a conspicuous example of the maxim '*falsa demonstratio non nocet cum de corpore constat.*'

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[29] A similar rule has been established in the case of the implied warranty of seaworthiness *The Christel Vinnen* [1924] P. 208. For a case there was 'personal want of due diligence to make the vessel seaworthy' see *Nello Simoni* v. *A/S M/S Straum* (1949) 83 Ll.L. Rep. 157 (no steps taken to pre-cool holds).

[30] *Minister of Materials* v. *Wold Steamship Co., Ltd.* [1952] 1 Lloyd's Rep. 485. As to the meaning of the phrase 'latent defect,' see *The Dimitrios N. Rallias* (1922) 13 Ll.L. Rep. 363 at 365, 366; *Charles Brown & Co., Ltd. & Others* v. *Nitrate Producers' Steamship Co., Ltd.* (1937) 58 Ll.L. Rep. 188 at 191.

[31] *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd.* [1957] 2 Q.B. 233, C.A. For a case in which the provisions of the Australian Sea Carriage of Goods Act, 1924, was held to be effectively incorporated into the charterparty see *Minister of Food* v. *Reardon Smith Line Ltd.* [1951] 2 T.L.R. 1158.

[31a] *Adamastos Shipping Co., Ltd.* v. *Anglo-Saxon Petroleum Co., Ltd.* [1958] 2 W.L.R. 688.

TIME CHARTERPARTIES

The usual form of time charterparty provides that the master is to be under the orders of the charterer as regards employment, agency or other arrangements, and that the charterer is to indemnify the owners against all consequences arising from the master signing bills of lading or otherwise complying with such orders.

The words 'such orders' have been held not to be limited to orders as to employment relating to the signing of bills of lading only. Further, an order as to the employment of the ship includes an order to load a cargo. If, therefore, damage is proximately caused by such an order, the charterer will be liable.[32]

It is customary to provide that payment of hire is to cease in the event of 'deficiency of men . . . breakdown of machinery, damage to hull or other accident . . . preventing the working of the vessel.'

Where the officers and crew were unwilling to take their vessel to sea except in convoy, hire was still due, for the owner had provided a full complement. The words 'deficiency of men' mean 'numerical deficiency,' and not 'deficiency of willingness in men to work.'[33] The Court of Appeal left open the question whether there would be a 'deficiency of men' if some of the crew were incapacitated through sickness or injury, whether they were on the ship or in hospital on shore.[34]

The wilful refusal of the officers and crew to proceed to sea did not come within the words 'or other accident,' for, although fortuitous and unexpected by the parties, it in no way resembled any of the other enumerated events which would serve to put the vessel off-hire.[35] But in a case where similar words were used, damage to the superstructure of a ship caused by an explosion came within the words 'or other accident.'[36]

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[32] *Royal Greek Government* v. *Minister of Transport* (1949) 83 Ll.L. Rep. 228.

[33] *Royal Greek Government* v. *Minister of Transport: The Ilissos* [1949] 1 K.B. 525, C.A.

[34] *ibid.* In the court below ([1949] 1 K.B. 5) Sellers, J., considered that in either of these events there would be a 'deficiency of men.'

It is often provided that hire must be paid monthly in advance on a particular day, and in default of such payment the owners are to have the right to withdraw the vessel from the service of the charterer. In an earlier case there was a dictum to the effect that payment a day or so late was sufficient,[37] but this has now been overruled by the House of Lords.[38] 'A stipulation for payment on a fixed day or for punctual payment on a fixed day (unless controlled as to meaning by other provisions of the document) means exactly what is said. Payment is not made on the fixed day if it is made later. Parties are at liberty to make such bargains as to dates as appeal to them, and full effect must be given to such bargains, however unreasonable it may appear that the exact terms should be insisted on.'[39]

In such a clause 'default' in payment means on 'failure so to pay.' It does not refer to the qualities of the payer.[40] 'Apart from some special circumstances excusing performance it is enough to constitute default that payment has not been made; neither deliberate non-performance nor negligence in performing the contract is necessary.'[41] If the payment is to be made in cash, and the owners have always accepted payment by cheque, they are not entitled to vary the agreed method of performance without due notice to the charterers.[42]

It is sometimes provided that hire is to cease if the vessel is lost or becomes a constructive total loss, but this does not mean that commercial impossibility of the further performance of the charterparty will not put an end to it, irrespective of such a clause.

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[35] *ibid.*

[36] *Royal Greek Government* v. *Minister of Transport* (1949) 83 Ll.L. Rep. 228.

[37] *Nova Scotia Steel Co., Ltd.* v. *Sutherland Steam Shipping Co., Ltd.* (1899) 5 Com.Cas. 106 at 109.

[38] *Tankexpress A/S* v. *Compagnie Financière Belge des Petroles S.A.* [1949] A.C. 76, H.L.

[39] *ibid.*, at p. 100 (*per* Lord Uthwatt).

[40] *ibid.*, at p. 100 (*per* Lord Uthwatt).

[41] *ibid.*, at p. 91 (*per* Lord Porter).

[42] *ibid.*

Thus, in a case where the charterers were given an option to purchase the vessel during the currency of the charter, it was held that they could not exercise it after the commercial purpose of the charterparty had been frustrated, whether or not the ship was technically an actual or constructive loss within the meaning of the off-hire clause.[43]

DEMURRAGE

Recent cases have re-emphasised the difference between a port charterparty and a berth charterparty in connection with the question whether or not the vessel is an 'arrived ship.'[44] Thus, if the berth at which the vessel ultimately has to load or discharge is named either in the charterparty or by virtue of a power of nomination expressly given by the charterparty, she is not an 'arrived ship' until she arrives at the berth. If on the other hand, there is no power of nomination expressly given and no berth is named, so that she goes to the berth ordered by the charterers merely by virtue of the implied right which they have to select the berth, then she becomes an 'arrived ship' when she arrives at the place named in the charterparty as the port.[45]

Exception clauses relating to circumstances in which lay days are not to count or demurrage to accrue have frequently been the subject of judicial decision. Usually if a charterer is excused from 'loading' because of circumstances preventing the loading, *e.g.*, frost, an exception clause of this nature is deemed to apply only to the bare operation of loading and not to his failure to get the cargo down to the quay by reason of the excepted peril.[46] Such a failure would be excused, however, if the words are, for example, 'frost preventing the provision of cargo.'[47]

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[43] *Blane Steamships Ltd.* v. *Minister of Transport* [1951] 2 K.B. 965, C.A. For a case in which a time charterparty was not frustrated when the vessel was requisitioned during the period of the Suez crisis, see *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [1958] 1 All E.R. 787.

[44] *Stag Line Ltd.* v. *Board of Trade* [1950] 2 K.B. 194, C.A.; *'Graigwen' (Owners)* v. *Anglo Canadian Shipping Co., Ltd.* [1955] 2 Lloyd's Rep. 260; *North River Freighters Ltd.* v. *H.E. The President of India* [1956] 1 Q.B. 333, C.A.; *(Agrimpex) Hungarian Trading Company for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.* [1957] 1 W.L.R. 1228.

[45] See generally *Leonis S.S. Co.* v. *Rank* [1908] 1 K.B. 499.

[46] *Kay* v. *Field* (1882) 10 Q.B.D. 241; *Grant* v. *Coverdale* (1884) 9 App.Cas. 470; *Bunge y Born* v. *Brightman* [1925] A.C. 799.

[47] *Pinch & Simpson* v. *Harrison Whitfield & Co.* (1948) 81 Ll.L. Rep. 268.

An exception clause stating that the charterer was to be excused if delay in discharging was occasioned by 'causes beyond his control' was held to apply even though the delay was operating at the time when the contract was made, and neither party knew of it.[48] If time is not to run when the delay is due to the 'inability or insufficiency of the ship to discharge,' these words relate to her structural capacity and equipment and not to other causes.[49]

Where the charterparty states that a certain number of days are to be allowed for the ship 'to be loaded,' and after that demurrage is to be payable, a question may arise as to when loading has been completed. This question has been answered in *Argonaut Navigation Co., Ltd.* v. *Ministry of Food: S.S. 'Argobec'*[50] where Bucknill, L.J., observed[51]: 'The task of loading is a joint operation . . . each party must do what is reasonable to enable the other to do his part and . . . loading is not complete until the cargo is so placed in the ship that she can proceed on her voyage in safety.' So a ship was not 'loaded' until her cargo of grain had been loaded and bagged in the 'tween decks to comply with safety regulations.[52]

The expression 'weather working days' appears to have come into use in shipping matters at about the end of the last century somewhere about the nineties.[53] Two new decisions have recently been added to the list of authorities explaining the meaning of this term.

In *Alvion Steamship Corporation of Panama* v. *Galban Lobo Trading Co. S.A. of Havana*[54] Lord Goddard, C.J., considered that when the word 'weather' was used in front of the word 'working day,' it meant that from the working day, whatever it might be, was to be deducted the time which the men were stood off, or the loading was suspended, by reason of rain or other weather conditions[55]—for example there might be a hurricane, or something of that sort to prevent work being done. For the purpose of determining the length of the 'working day' one had to find out what were the customary hours or usual ordinary hours[56] that were worked either at a particular place or in a particular trade. To say that a working day was a period of twenty-four hours seemed to him to ignore entirely the fact that the word 'working' qualified the word 'day' and cut it down, and, in his opinion, 'working day' meant the part of a day during which work was carried on. In an earlier case[57] Lord Russell of Killowen, C.J., had expressed the view that where work was stopped by bad weather, but a substantial quantity of work was done, though not amounting to half a day, it was to be reckoned as half a day; where substantially half a day's work was done, though not amounting to a whole day, it was to be counted as a whole day. The Court of Appeal, however, in the *Alvion Steamship Corporation*[58] case considered that this was a somewhat rough and ready rule. The proper method of calculation was to take the actual time on any particular day on which the weather had stopped work and deduct it from the number of hours of the working day.

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[48] *Steamship Induna Co., Ltd.* v. *British Phosphate Commissioners* [1949] 2 K.B. 430 (local law forbidding discharge at night).

[49] *ibid.*

[50] [1949] 1 K.B. 572, C.A.

[51] *ibid.*, at p. 582.

[52] *ibid.*

[53] *Branckelow Steamship Co.* v. *Lamport & Holt* [1897] 1 Q.B. 570; *Bennetts & Co.* v. *Brown* [1908] 1 K.B. 490; *British & Mexican Shipping Co., Ltd.* v. *Lockett Bros. & Co., Ltd.* [1911] 1 K.B. 264.

[54] [1955] 1 Q.B. 430.

In *Compania Naviera Azuero S.A.* v. *British Oil & Cake Mills Ltd.*[59] Pearson, J., had to consider whether a 'weather working day' was one on which the weather permitted relevant work to be done, and relevant work was in fact done. He concluded that it meant a day on which the weather permitted the relevant work to be done, whether or not any person availed himself of that permission. Conversely a day was not a 'weather working day,' if the weather did not permit the relevant work to be done, and it was not material to inquire whether any person intended or planned to do any relevant work on that day. The status of the day as being a 'weather working day' was determined solely by its own weather, and not by extraneous factors such as the actions, intentions and plans of any person.

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[55] *Dampskibsselskabet Botnia A/S* v. *Bell & Co.* (1931) 41 Ll.L.R. 160 (a day on which ice prevents loading is not a 'weather working day').

[56] In the instant case it was proved that it was the established custom at the ports of Cardenas and Havana for the working day to be 8 hours on Mondays to Fridays and 4 hours on Saturdays.

[57] *Branckelow Steamship Co.* v. *Lamport & Holt* (*supra*).

[58] *supra.*

[59] [1957] 2 Q.B. 293.

In 1925 Scrutton, J., (as he then was) said that as long as he could remember there had been controversy between shipowner and charterer as to who was to bear the risk of waiting at a port for a berth.[60] Two recent cases have sustained the controversy.

In *North River Freighters Ltd.* v. *H.E. The President of India*[61] one clause of a charterparty provided that 'time lost in waiting for berth to count as loading time,' whilst another stated that the lay days were to commence twenty-four hours after the vessel was ready for cargo, and the master had given written notice to the charterers. The ship was kept waiting for a berth for seven days because of quarantine restrictions, and the charterers contended that they were not liable to pay anything in respect of them, because 'time lost was to count as loading time' and the loading time had not begun, nor had the lay days commenced as no notice had been given by the master. The Court of Appeal held that the two clauses were independent of each other, and that the risk of time wasted in waiting for a berth was clearly placed upon the charterers. Parker, L.J., observed[62]: 'No doubt "time" cannot be said to be "lost" until it has begun to run, but it surely begins to run when the vessel has reached the point where she has to stop until a berth is available. It seems to me that that is the natural meaning of the words, and that the expression is wholly independent of the time when loading time commences.'

This decision was applied in *Roland Linie Schiffahrt G.M.B.H.* v. *Spillers*[63] where it was provided in the charterparty that if a discharging place was not immediately available, demurrage in respect of all time waiting thereafter should be paid. This clause was held to come into operation before the lay days had commenced to run. The vessel had reached the customary waiting place for ships waiting for a berth,[64] and that was all that was necessary even though she was not an 'arrived ship' for the purpose of commencing to discharge her cargo.

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[60] *Van Nievelt Goudrien & Co. Stomvaart Maatshappij* v. *C. A. Forslind & Son Ltd.* (1925) 30 Com.Cas. 263 at 267.

[61] [1956] 1 Q.B. 333, C.A.

[62] *ibid.*, at p. 349. Singleton, L.J., pointed out (at p. 340) that the charterparty might have provided that time lost in waiting for a berth was to be paid for at a certain rate per day. But, as drawn, it gave the charterers an advantage, for they might save on loading time some or all of the time lost in waiting for a berth.

[63] [1957] 1 Q.B. 109.

Where a charterparty stated 'time to commence 24 hours, Sundays and holidays excepted, after vessel is ready to unload, and written notice given, whether in berth or not,' the charterers could not take advantage of this clause to obtain dispatch money by beginning to unload before the notice of readiness had expired.[64a]

In present-day charterparties it is now usual, instead of providing for a fixed number of lay days, to provide for loading at a daily rate. It is considered fairer to leave the lay days to be fixed retrospectively instead of trying to estimate the correct number in advance.

Where cargo was to be unloaded 'at an average rate of not less than 150 metric tons per available working hatch,' it was held that the lay time was to be calculated by dividing by 150 the largest quantity of cargo loaded into any one of the holds, adjustments being made if any hatch were not available.[65] Where cargo was to be loaded 'at the rate of 600 tons when the vessel is in a berth, and 350 whilst in stream per clear working day,' the court held that the reduced loading rate of 350 tons was intended to apply only when the stream was being actually used as a loading place. The words 'whilst in stream' did not refer to the mere presence of the vessel in the stream. No relief was intended to be given to the charterers in respect of the waiting period.[66] If a right to 'average' the days for loading and discharging is given to a charterer, the two calculations of the time taken in each operation must be kept separate until the very end, when a balance is struck. If time is saved on discharge, that is set against the excess time of loading or vice versa and in that way a net result is arrived at.[67]

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[64] In this case it was proved that one of the customary waiting places for ships bound for Hull was 22 miles from the port itself.

[64a] *Petroti Compania Naviera S.A.* v. *National Coal Board* [1958] 1 All E.R. 603.

[65] *Compania de Navigacion Zita S.A.* v. *Louis Dreyfus & Compagnie* [1953] 1 W.L.R. 1399.

[66] *V.M. Salgaoncar E. Irmaos of Vasgo de Gama* v. *Goulandris Bros. Ltd.* [1954] 1 W.L.R. 481. It appeared that in Mormugao, the port of loading in this case, a vessel might not get a berth, and might have to do the whole or part of her loading in the stream, presumably from lighters.

FREIGHT

It is the function of the judge to direct the jury as to the meaning of the terms 'natural and direct consequences' or 'reasonably foreseeable consequences' and whether a particular head of damage is capable in law of being a consequence falling within those phrases. He must direct them whether there is any evidence that a particular consequence is a consequence falling within those phrases. The jury must then find as a fact whether a particular head of damage is such a consequence.[68]

This principle was applied in a case where freight was payable in advance. The charterers did not pay on the date on which it was due, and shortly afterwards the pound sterling was devalued. In an action for damages for the loss that had resulted, the court refused to upset an arbitrator's finding that it would have required a wholly unreasonable standard of prevision on the part of the charterers to have foreseen that there was a serious possibility or real danger of a loss arising if they did not pay at the proper time, and therefore they were not liable.[69]

Where lump sum freight is due, complicated questions as to the method of its computation may arise if the vessel is guaranteed to have a particular deadweight cargo capacity and a cubic feet bale capacity available for cargo, and the proper cubic capacity is not placed at the charterer's disposal.[70]

Freight is the remuneration to which a shipowner is entitled on the performance of his obligation under the charterparty. It is a sum which has no relation to the profits which he may make or the expenses which he may have to incur in order to earn that freight.

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[67] *Alma Shipping Co. S.A.* v. *V. M. Salgaoncar E. Irmaos Ltda.* [1954] 2 Q.B. 94. For a case where a vessel had to discharge at two ports and the double discharge was regarded as one unloading for the purpose of calculating demurrage see *United British Steamship Co., Ltd.* v. *Minister of Food* [1951] 1 Lloyd's Rep. 110.

[68] *Mehmet Dogan Bey* v. *G. G. Abdeni & Co., Ltd.* [1951] 2 K.B. 405.

[69] *ibid.*

[70] *J. & C. Harrison Ltd.* v. *Board of Trade* (1949) 82 Ll.L. Rep. 730.

Thus, in one case freight was to be calculated on the vessel's deadweight capacity for wheat in bags, but an option was given to load an alternative cargo. This alternative cargo was in fact loaded, but although the vessel was fully loaded, the weight was 579 tons short of her deadweight capacity. The charterers contended that from the freight they could deduct a sum representing the saving of expense to the shipowners by reason of the 579 tons not shipped not having to be discharged, but this plea was rejected by the Court of Appeal. Singleton, L.J., considered that if the charterers were to have the benefit of any saving because of less expenses, it would have been quite easy to add words to that effect.[71]

One very important question has arisen as to the liability for freight if the vessel carrying the goods is overloaded so that her load line is submerged contrary to the Merchant Shipping (Safety and Load Line Conventions) Act, 1932.[72] Devlin, J., said that it might be that a contract for the loading of a ship which necessarily had that effect would be unenforceable. But an implied prohibition of contracts of loading did not necessarily extend to contracts for the carriage of goods by improperly loaded vessels. In his judgment contracts for the carriage of goods were not within the ambit of the statute at all. A court should not hold that any contract or class of contracts was prohibited by statute, unless there was a clear implication that the statute so intended. Caution in this respect was especially necessary in these times, when so much of commercial life was governed by regulations of one sort or another which might easily be broken without wicked intent. Persons who deliberately set out to break the law could not expect to be aided in a Court of Justice, but it was a different matter when the law was unwittingly broken.

Accordingly freight was payable under the charterparty. The learned judge gave examples of the inconveniences and injury to maritime business which would follow if he had decided otherwise. A shipowner, who accidentally overloaded by a fraction of an inch, would not be able to recover from any of the shippers or consignees a penny of the freight. Numerous other illegalities, which a ship might commit in the course of the voyage, would have the same effect, *e.g.*, if the ship were sent to sea laden with grain, and all necessary and reasonable precautions had not been taken to prevent the grain from shifting.[73]

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[71] *Hain Steamship Co., Ltd.* v. *Minister of Food* [1949] 1 K.B. 492, C.A.

[72] *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.

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[73] Merchant Shipping (Safety Conventions) Act, 1949, s. 24.

12

STATE SHIPS AND STATE AIRCRAFT

BIN CHENG

Is an aircraft a horse, asked a learned judge not long ago, without intending to be rhetorical.[1] But, indeed, was not the first air borne means of transport a horse, Pegasus which bore its master from victory to victory until it led him to his utter annihilation in his final ambition and vain bid to reach Olympus? Be that as it may, the need to clarify the meaning of the very terms 'ships' and 'aircraft' before approaching the somewhat neglected but none-the-less current subject of State ships and State aircraft[2] is obvious. This preliminary task over, an attempt will be made in this paper to define the legal status of State ships and State aircraft on both the municipal and the international levels so as to present an integrated picture of the problem, or rather problems, many of which will find no ready answer but it is hoped merely to state.

DEFINITION OF SHIPS AND AIRCRAFT

In United Kingdom statutes, the word 'ship' is sometimes regarded as wider in meaning than the expression 'vessel,'[3] but the reverse is also true.[4] In the United States, 'the term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water,'[5] excluding, however, aircraft.[6] This is one of the widest definitions in the municipal laws of the various countries.

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[1] Roxburgh, J., in *Maclean (Inspector of Taxes)* v. *Trembath* [1956] 1 W.L.R. 437; see *The Times,* March 16, 1956.

[2] *Cf.* Lord Denning's judgment in *Rahimtoola* v. *Nizam of Hyderabad* [1957] 2 W.L.R. 884 at 907. State ships also form part of the subject of the regime of the high seas discussed at the 1958 Geneva Conference (see U.N. Gen. Ass., *Off.Rec.*, Annexes (XI) 53; and *Verbatim Records of the Debate in the Sixth Committee of the General Assembly, at its Eleventh Session, Relating to Agenda Item 53* (*a*), U.N. Doc. A/Conf. 13/19 (2 vols.)).

[3] *e.g.*, Merchant Shipping Act, 1894, s. 740. *Cf. Edwards* v. *Quckenden and Forester* [1939] P. 261 at 268.

[4] *Cf.* Crown Proceedings Act, 1947, s. 30 (3).

Since, however, international maritime law governs primarily maritime navigation, the expression 'ships' in international customary maritime law relates, it would seem, essentially to seagoing ships or vessels,[7] terms which it uses, moreover, synonymously. But there is of course nothing in international law to prevent States, in treaty arrangements governing either maritime or inland navigation, to attach any special meaning to these words.[8]

In so far as aircraft is concerned, among parties to the 1944 Chicago Convention on International Civil Aviation, as previously among those to the 1919 Paris Convention on the Regulation of Aerial Navigation,[9] aircraft is defined as 'all machines which can derive support in the atmosphere from the reactions of the air.'[10] A large number of municipal air laws follow this definition which includes (a) machines heavier than air that are mechanically driven (such as aeroplanes, seaplanes or helicopters), as well as those that are not mechanically driven (such as gliders or even kites) and (b) machines lighter than air, whether mechanically driven (such as airships) or non-mechanically driven (such as captive or free balloons).

But, by confining the term 'aircraft' to machines which fly

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[5] 46 United States Code, Chap. 23, Shipping Act, 1916, § 801.

[6] Code of Federal Regulations, Title 19—Customs Duties (Revised 1953), § 3.1.

[7] The legal status of ships engaged in inland navigation is in municipal law frequently regulated by separate legislation and in international law usually governed by special tacit or express arrangements between the States concerned. *Cf., e.g.,* the 1930 Geneva Convention on the Registration of Inland Navigation Vessels (Hudson, 5 *Int.Leg.,* p. 822).

[8] *Cf. e.g.,* the 1930 Geneva Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation, Art. 11: 'For the purposes of the present Convention, the term "vessels" includes hydroplanes, rafts, ferryboats, dredgers, floating cranes and elevators, movable sections of boat-bridges and all floating appliances or plant of a similar nature' (Hudson, 5 *Int.Leg.,* p. 815).

[9] Hudson, 1 *Int.Leg.,* p. 359.

[10] Annexes 6, 7 and 8 to the Chicago Convention. These Annexes are published separately by the International Civil Aviation Organisation (ICAO) and periodically amended by it. See also ICAO, *Lexicon of Terms used in Connection with International Civil Aviation* (1952), *sub voce* 'Aircraft.'

because they can derive support from the reactions of the air, the above definition excludes machines which are able to fly in the air independently of any support derived from the reactions of the air, as, for instance, missiles, rockets or earth satellites.[11] This type of machine is, however, included in the legal definition of aircraft in many countries, *e.g.*, Argentina, Canada, Dominican Republic, Egypt, France, Guatemala and the United States.[12] The Brazilian Air Code of 1939 in fact goes so far as to extend the meaning of 'aircraft' to all machines capable of flight and navigation in *space* as such, that is to say, both airspace and outer space. From the strict terminological point of view, it may, however, be advisable to distinguish aircraft from space craft, although both may be included within the term 'flight craft.'[13]

Since States are always free in their treaty arrangements, in the case of aircraft as in the case of ships, to assign a specific meaning to any of these terms,[14] it may be wondered what, in international customary law, is the legal definition of aircraft. According to the natural meaning of the word, the expression aircraft probably includes all machines designed for flight in the air, whether or not they can derive support from the reactions of the air, even though the narrower definition is more widely adopted.

DEFINITION OF STATE SHIPS AND STATE AIRCRAFT

For the purposes of the present paper, the expression State ships and State aircraft is used to cover ships and aircraft owned or operated by a State, as well as privately owned or operated ships and aircraft which enjoy a special status by reason of their being in the exclusive possession or service of a State. In particular, it is not intended to use the term State aircraft in the restrictive meaning it is employed within the framework of the International Civil Aviation Organisation as including only aircraft in military, customs and police services,[15] except where otherwise indicated by the context. Some of the difficulties which confront this subject spring from the following considerations: (a) the gradual withdrawal on the level of municipal law of the many immunities and privileges hitherto enjoyed by State ships and State aircraft; (b) their ever mounting tonnage and number; (c) their continuously increasing participation in commerce; and (d) the slowness of both international law and certain systems of municipal law to adapt themselves to this altered situation.

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[11] *Cf.* the writer's 'Recent Developments in Air Law,' Vol. 9 (1956) of this Annual, p. 208, at pp. 211–12.

[12] The municipal laws of a large number of countries in the field of civil aviation have been conveniently collected together in the following ICAO publication: *Recueil des lois nationales de base relatives à l'aviation civile* (2 vols., n.d.). Reference to municipal air laws are to this Collection unless otherwise indicated. Cf. also E. Pépin, 'Development of the National Legislation on Aviation Since the Chicago Convention,' 24 J.A.L.C. (1957), p. 1.

[13] See the writer's 'International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites,' 6 I.C.L.Q. (1957), p. 487, at pp. 490–1.

[14] *Cf., e.g.,* Pan-American Sanitary Convention, Havana, 1924, Art. 2 (Hudson, 2 *Int.Leg.*, p. 1508); 1948 Geneva Convention on the International Recognition of Rights in Aircraft, Art. XVI (Cmd. 7510—1948).

Historically speaking, it may perhaps be said that ships and aircraft owned or operated by the State (in the case of ships, at least, for purposes of international law, often classified as or assimilated to warships *sensu lato*) were contradistinguished to merchant ships and private aircraft. Thus, in the United Kingdom, initially the Merchant Shipping Act, 1894, was, except where specially provided, not applicable to ships belonging to Her Majesty.[16] By virtue of section 80 of the Merchant Shipping Act, 1906, however, British Government ships may, by Order in Council, be registered as British ships and submitted to the Merchant Shipping Acts. Similarly, Part VI of the Civil Aviation Act, 1949, as well as any enactment to which Part VI of the Act applies, does not apply to 'aircraft belonging to or exclusively employed in the service of Her Majesty,' but this again may be varied by Order in Council.[17]

At present, apart from warships and military aircraft, United Kingdom Government ships, under various Orders in Council,[18] and United Kingdom Government aircraft, under the Air Navigation Order, 1954,[19] may be registered as British ships and British aircraft. Moreover, ships and aircraft belonging to public corporations such as the Air Corporations, although ultimately owned by the State, are substantially subject to the ordinary rules of law.[20] Consequently, it is no longer possible to regard merchant ships as exclusively private ships nor civil aircraft purely private aircraft. Conversely, private ships and private aircraft may often be clothed with a public character, for instance, when requisitioned by a State or otherwise placed under its control.[21] While what has been said above is in relation to the United Kingdom, the position is largely the same in other countries. However, at least in so far as British ships are concerned, it is fortunate to be able easily to separate them into three groups according to the ensign they are entitled to carry: warships (white), public ships (blue) and merchant ships (red), whereas most countries use merely one flag.

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[15] 1944 Chicago Convention on International Civil Aviation, Art. 3 (b) (Hudson, 9 *Int.Leg.*, p. 168). See also below, pp. 233 *et seq.*

[16] s. 741.

[17] s. 61.

[18] Admiralty, March 22, 1911 (S.R. & O., 1911, No. 338); War Department, June 4, 1918 (S.R. & O., 1918, No. 658); Ministry of Agriculture and Fisheries, February 9, 1920 (S.R. & O., 1920, No. 260); Fishery

WARSHIPS AND MILITARY AIRCRAFT

Warships and military aircraft constitute State ships and State aircraft *par excellence,* whether or not owned by the State in question.[22] In the United Kingdom, the white ensign may be

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Board for Scotland, February 9, 1920 (S.R. & O., 1920, No. 261/S. 22); Board of Trade (now Ministry of Transport and Civil Aviation), July 14, 1921 (S.R. & O., 1921, No. 1211); Commonwealth of Australia, December 8, 1924 (S.R. & O., 1924, No. 1391); Air Council, May 26, 1925 (S.R. & O., 1925, No. 510); Falkland Islands, June 25, 1925 (S.R. & O., 1925, No. 604); Straits Settlements, August 10, 1926 (S.R. & O., 1926, No. 1036); India, November 5, 1929 (S.R. & O., 1929, No. 986); Union of South Africa, November 5, 1929 (S.R. & O., 1929, No. 987); Northern Ireland, May 15, 1930 (S.R. & O., 1930, No. 336); Fiji, November 4, 1938 (S.R. & O., 1938, No. 1331); New Zealand, July 10, 1946 (S.R. & O., 1946, No. 1086); British Guiana, March 4, 1949 (S.I., 1949, No. 353); Sierra Leone, January 29, 1951 (S.I., 1951, No. 143); Department of Scientific Research, October 31, 1957 (S.I., 1957, No. 1878).

[19] S.I., 1954, No. 829, Arts. 69 and 70. See Part I of the Order as regards the registration of British aircraft.

[20] *Cf.* Air Corporations Act, 1949, s. 7, especially subsection (2): 'It is hereby declared that no provision of this Act conferring any power or imposing any duty upon any of the corporations authorises the disregard by the corporation of any rule of law, whether having effect by virtue of any enactment or otherwise.'

[21] See below, pp. 231, 234 *et seq.* and 247–8.

[22] In fact, according to Professor Gidel, up to the beginning of the twentieth century, all public ships were warships or assimilated to warships

worn only by Her Majesty's ships *sensu stricto,* that is to say, ships actually in commission.[23] Other ships, even if belonging to or in the service of the Admiralty, may not fly the white ensign, except when being launched and there is a naming ceremony.[24] This regulation appears to coincide with the definition of warship as found in the 1907 Hague Convention VII relative to the Conversion of Merchant Ships into Warships which sets out four distinctive elements: (1) It must be placed under the direct authority, immediate control and responsibility of the Power whose flag it flies; (2) It must bear the external marks which distinguish the warships of that Power; (3) The commander must be in the service of the State and duly commissioned by the proper authorities. His name must figure on the list of the officers of the military fleet; (4) The crew must be subject to the rules of military discipline.[25] Such ships alone may claim the status of warships under international law.

As regards military aircraft, the United Kingdom Air Navigation Order, 1954, provides that this term includes the 'naval, military and air force aircraft . . . of any country, and every aircraft commanded by a person who is serving in the naval, military and air forces of any country and is detailed to command that aircraft.'[26] At the Aeronautical Commission of the

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(1 *Le droit international public de la mer* (1932), pp. 96 *et seq.*). It may be noted that Article 6 of the Anglo-Belgian Postal Convention of 1876 (67 B.F.S.P., p. 19), which, but for its lack of incorporation into English law by Statute (*cf.* (1879) 4 P.D. 129, *per* Sir Robert Phillimore), would have been applicable in the case of the *Parlement Belge,* provided that Belgian postal packets should 'be considered, and treated in . . . all . . . British ports at which they may . . . touch, as vessels of war, and be there entitled to all the honours and privileges which the interests and the importance of the service in which they are employed, demand.' The Court of Appeal in its judgment did, however, use the term 'public ship' several times ((1880) 5 P.D. 197).

[23] See The Queen's Regulations and Admiralty Instructions (Q.R. & A.I.), Explanation of Terms, *sub voce* 'Her Majesty's ship,' and Article 1232. *Cf.* 7 *Halsbury's Laws of England* (3rd ed. by Simonds, 1954), p. 4: By Order in Council dated July 9, 1864, it was directed that in future the white ensign should be used by all Her Majesty's ships in commission, the blue ensign by merchant ships commanded by officers of the Royal Naval Reserve with Permission of the Admiralty and the red ensign by all other ships belonging to Her Majesty's subjects. *Cf.* also the Naval Discipline Act, 1866 (29 & 30 Vict., c. 109, as amended 12 & 13 Geo. 5, c. 37) and the Naval Prize Act, 1918 (8 & 9 Geo. 5, c. 30).

[24] Q.R. & A.I., Art. 1242.

[25] A. P. Higgins, *The Hague Peace Conferences* (1909), pp. 308 *et seq.*

[26] Art. 73 (1).

1919 Peace Conference, the British Government proposed the following definition: 'Military aircraft are State aircraft in military service (including naval service) when they are under the orders of a commander in uniform and carry a certificate proving their military character.'[27] The 1919 Paris Convention defined military aircraft as 'every aircraft commanded by a person in military service detailed for the purpose,'[28] but the term has not been defined in the 1944 Chicago Convention.[29]

PUBLIC SHIPS AND PUBLIC AIRCRAFT

According to Article 1251 of the Queen's Regulations and Admiralty Instructions, the blue ensign, with or without modification or defacement, is to be worn by the following categories of British ship:

(1) Ships and vessels employed in the service of any public office in the United Kingdom;

(2) Ships and vessels employed in the service of a public office of a Colony, Protectorate or Mandated or Trust Territory[30];

(3) Vessels, other than warships, belonging to the Admiralty, if of fifty tons gross or upwards;

(4) Vessels, other than warship, chartered in Admiralty service, if of fifty tons gross or upwards;

(5) The Royal Naval Minewatching Service. In addition, Naval Servicing Craft, when manned by civilian crews, are to wear the blue ensign defaced with the yellow Admiralty Anchor, while they should wear the white ensign when manned by naval crews.[31] Finally, under the authority of an Admiralty Warrant, British merchant ships and fishing vessels are allowed to wear the blue ensign plain and undefaced, subject to a number of conditions being fulfilled.[32]

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[27] Draft International Convention Providing for Aerial Navigation, British Proposal, Art. 15 (i) (A. Roper, *La Convention internationale du 13 octobre 1919* (1930), pp. 256 *et seq.*).

[28] Art. 31 (Hudson, 1 *Int.Leg.*, pp. 359 *et seq.*).

[29] See above, p. 228, and below, pp. 233 *et seq.*

[30] *Cf.*, however, Q.R. & A.I., Art. 1234 (2).

[31] Q.R. & A.I., Art. 1271 (5).

[32] Merchant Shipping Act, 1894, s. 73 (1). Q.R. & A.I., Art. 1252.

Apart from the above circumstances, as section 73 (1) of the Merchant Shipping Act, 1894, provides, the red ensign, without any defacement or modification whatsoever, is the proper national colours for all British ships.[33] It should be noted that the basis on which the wearing of the blue ensign is authorised is essentially functional, dependent upon the service in which the ship is employed. From this point of view, it is of especial interest to find that according to a Note to Article 1251 of the Queen's Regulations and Admiralty Instructions, 'vessels belonging to the Admiralty which are on charter to private firms wear the red ensign.'

The answer to the question whether international customary law knows a rigid distinction between on the one hand public ships and public aircraft and on the other hand private ships and private aircraft may be obscure. But such a distinction is frequently drawn in the treaty superstructure of international law, where the application of a treaty to public ships or aircraft is excluded. For instance, in the Statute on the Régime of Navigable Waterways of International Concern, annexed to the 1921 Barcelona Convention, this is worded as follows: 'This Statute has no reference to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any kind of public authority.'[34]

In the 1919 Paris Convention on the Regulation of Aerial Navigation, 'State aircraft' was defined as comprising '(a) Military aircraft and (b) Aircraft exclusively employed in State service, such as posts, customs, police.'[35] However, it provided at the same time that 'all State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.'[36] From this point of view, purely as regards terminology, the Paris Convention is probably to be preferred to the 1944 Chicago Convention which limits State aircraft solely to 'aircraft used in military, customs and police services,' while it may have intended no more than to provide that only these categories of State aircraft are to be excluded from the application of the Convention.

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[33] Merchant Shipping Act, 1894, s. 73. Q.R. & A.I., Art. 1254. Yacht clubs may, subject to certain conditions, obtain an Admiralty Warrant so as to enable their members to fly a special ensign, and a list of such clubs is published in the Navy List (Q.R. & A.I., Art. 1253).

[34] Art. 17 (Hudson, 1 *Int.Leg.*, p. 645). *Cf.*, *e.g.*, also Statute on the International Régime of Maritime Ports, annexed to the 1923 Geneva Convention, Art. 13: 'This Statute applies to all vessels, whether publicly or privately owned or controlled. It does not, however, apply in any way to warships or vessels performing police or administrative functions, or, in general, exercising any kind of public authority, or any other vessels which for the time being are exclusively employed for the purposes of the Naval, Military or Air Forces of a State' (Hudson, 2 *ibid.*, p. 1156); 1924 Brussels Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, Art. 13: 'This Convention does not apply to vessels of war, nor to Government vessels appropriated exclusively to the public service' (*ibid.*, p. 1332).

It is, however, also possible to regard Article 3 of the Chicago Convention in which this definition appears as of a substantive character. Thereby other categories of aircraft owned or operated by a contracting State shall not be treated as State aircraft with their attending privileges and immunities, but, as it was so provided in the Paris Convention, 'shall be treated as private aircraft.'[37]

On the other hand, the expressions 'military aircraft' and 'aircraft used in military services' are not necessarily synonymous, and this would apply *mutatis mutandis* to police and customs aircraft. In this respect the functional criterion used in the Chicago Convention probably reflects more accurately the intention of the parties than the Paris formula, now revived in the 1952 Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface.[38] Several decisions of the German-United States Mixed Claims Commission (1922) illustrate this distinction and, moreover, support the proposition that an international objective criterion can be found to ascertain whether a given ship or aircraft is or is not engaged in the exercise of any kind of public authority. Although these decisions were concerned specifically with whether certain ships were to be regarded as having been employed in the military service, the principle applied seems to be capable of a wider application. In its *Opinion Construing the Phrase 'Naval and Military Works or Material' as applied to Hull Losses and also Dealing with Requisitioned Dutch Ships* (1924), it held: 'A ship privately operated for private profit cannot be impressed with a military character, for only the government can lawfully engage in direct warlike activities.'[39] 'The taxicabs privately owned and operated for profit in Paris during September 1914 were in no sense military materials; but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners.'[40] In the case of *Cession of Vessels and Tugs for Navigation on the Danube* (1921), the Arbitrator had also arrived at a similar conclusion. He said that, 'in view of the organisation, methods, purposes and results of the Zentral Transport Leitung Navigation Group [of the Austro-Hungarian Monarchy] it was a military organisation, and the vessels which it had hired and was operating had lost for the time being their strictly private aspect, and had become war material.'[41] They constituted public ships in military service,[42] although not warships in the technical sense of the term.[43] Similarly, aircraft so employed would be aircraft in military service, though not technically military aircraft.

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[35] Art. 30 (1). It is interesting to observe that Art. 30 (2) provided that 'Every other aircraft shall be deemed to be a private aircraft,' *i.e.*, every aircraft other than military aircraft and aircraft exclusively employed in State service. See also next footnote.

[36] Art. 30 (3). The terminology of the Paris Convention is more logical in that such aircraft are not 'deemed' to be, but merely 'treated as' private aircraft. Thus, an aircraft exclusively employed in the Postal service of a State remains a State aircraft, but is, for the purposes of the Convention, treated as if it were a private aircraft.

[37] See above, note 36, and below, pp. 238–9 and 242. In particular, any aircraft of the contracting States, other than those used in military, customs and police services, when flying into or over the territory of any other contracting State must subject themselves to the provisions of the Convention, which in turn oblige them to submit to a number of rules and regulations of the State flown over (*e.g.*, Arts. 9–16, 29–36, 87).

Inasmuch as the application of some of these rules and regulations is not merely a faculty of the contracting States, but also a duty under the Chicago Convention (*e.g.*, Arts. 8, 11, 12, 14, and 87), it may well be maintained that a contracting State has the right to enforce these rules and regulations, even though the aircraft concerned may be owned or operated by another contracting State. It should, furthermore, be mentioned that the operation of air services by States, whether directly through their governments or indirectly through wholly State-owned or partly State-owned companies, is clearly envisaged by Article 79 of the Convention.

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[38] Art. 26 (Cmd. 8886—1953).

[39] *Decisions and Opinions*, p. 75, at p. 79; 7 UNRIAA, p. 73, at p. 77. See also the *Christian Damson* case (1925), *Dec. & Op.*, p. 243; 7 UNRIAA, p. 184. *Cf.* G. Schwarzenberger, 1 *International Law* (2nd ed. 1949), pp. 278–80, 303–6.

[40] *Dec. & Op.*, p. 75, at p. 97; 7 UNRIAA, p. 73, at p. 88.

[41] 1 UNRIAA, p. 97, at p. 107.

In determining the public character of ships and aircraft, it might, therefore, be submitted that the essential criterion lies in the function they are at the material time discharging, irrespective of their actual ownership, whether private or public. The function they are called upon to fulfil involves the exercise of the public authority of a sovereign State. It is true that at some stage a State may wish to extend the notion of public authority. For instance, in countries in which all or most means of production have been nationalised, foreign commerce may well be looked upon as an exclusively governmental function. Internally, this may be a strictly domestic issue. But, as the International Court of Justice pointed out in the *Nottebohm* case (1955), 'international practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions.'[44] Applying this principle *mutatis mutandis,* it might well be said that third States are not under an international duty to accept any unilateral qualification or extension of the notion of public authority which, unless altered by consent, recognition, acquiescence of estoppel,[45] would be taken as hitherto understood by the generality of nations.

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[42] In the case of the S.S. *John G. McCullough,* a merchant ship which had been requisitioned by the United States through the Shipping Board in 1917 and turned over immediately to the War Department of the United States, which operated it with a British civilian crew, employed and paid by and in all things subject to the orders of the United States War Department, for the transport of general cargo for the Army of the United States, the German-United States Mixed Claims Commission (1922) held: 'At the time the *McCullough* was destroyed she was a public ship in the possession of and operated by the United States through its War Department' (*Dec. & Op.,* p. 73, at p. 96; 7 UNRIAA, p. 73, at p. 88).

[43] See above, p. 230.

[44] *I.C.J. Reports 1955,* p. 4, at p. 21.

[45] See G. Schwarzenberger, 'The Fundamental Principles of International Law,' 87 *Hague Recueil* (1955), p. 195, at p. 380: 'Unless the other entities concerned are prepared to recognise, consent to, or acquiesce in any [desired changes in any existing legal nexus] . . . , a subject of international law must be content to leave matters as they are.'

Cf. the same writer's *International Law and Totalitarian Lawlessness* (1943), pp. 42 *et seq.*

STATE OWNERSHIP OR POSSESSION

In contradistinction to ships and aircraft exercising public authority, is the mere ownership, possession or control of ships or aircraft by a sovereign State independently of the service in which such ships or aircraft are engaged. It is possible that both categories of ships and aircraft benefit from the immunities which a sovereign State enjoys before foreign courts. But the different bases on which such immunities rest were clearly distinguished by Lord Atkin in *The Cristina*:

'The foundation for the application to set aside the writ and the arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to be well established and to be beyond dispute.

'The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

'The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.'[46]

Here it may be recalled that in the United Kingdom, ships owned by the Admiralty but chartered to private firms wear the red ensign, but neither the white nor the blue ensigns.[47] The public character of such vessels or aircraft is ordinarily not at issue until and unless their actual ownership or possession by the sovereign is challenged. It may well be that the sovereign, as owner or possessor of such ships or aircraft, it not subject to the same duties and liabilities as an ordinary owner or possessor, but the duties and liabilities of those who operate them are not *ipso facto* thereby affected.

The case of *Thomas Stone Shipping Ltd.* v. *Admiralty and Others* (*The Albion*) concerns the collision of an uncompleted aircraft carrier while being towed from the Tyne to Rosyth. Hodson L. J., delivering the judgment of the Court of Appeal held that

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[46] [1938] A.C. 485 at 490.

[47] Q.R. & A.I., Art. 1251, note. See above, p. 232.

'the vessel was the absolute property of the Admiralty, even in her incomplete state.'[48] But this did not affect the duties and liabilities of the contractors who were 'responsible for her care and efficient protection until she was taken over by the Admiralty.'[49] Similarly, the German-United Mixed Claims Commission (1922), after having examined the practice of the United States Shipping Board and the Fleet Corporation during and after the First World War, referred to the case of *The Lake Monroe* (1919),[50] and held: 'It is apparent that a vessel either owned or requisitioned by the Shipping Board or Fleet Corporation and operated by an agent of the United States under . . . an operating or managing agreement [such as those used by the Shipping Board and the Fleet Corporation] . . . was a merchantman.'[51] They are not entitled to any special privileges or immunities in virtue of their public ownership insofar as their operation and management are concerned.

It is hoped that the above survey clarifies to some extent the notion of State ships and State aircraft by separating it into its component elements. Attention may perhaps now be turned to some of the substantive rules relating to such ships and aircraft, including privileges and immunities to which they may be entitled. A point which deserves to be noted first is the right of entry and transit of State ships and State aircraft through the territory of a foreign State.

ENTRY AND TRANSIT

In this regard, the position is probably clearer in the field of aviation than in maritime navigation. In the absence of tacit acquiescence[52] or express agreement,[53] there is, under international customary law, no right of entry at all for the aircraft of another State, whether State aircraft or private aircraft. No right of innocent air passage exists even in the airspace above the territorial sea of another State.

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[48] [1953] P. 117 at 132.

[49] *ibid.*

[50] 250 U.S. 246.

[51] *Dec. & Op.*, p. 73, at p. 85; 7 UNRIAA, p. 73, at p. 81.

[52] See *loc. cit.* in note 13 above, at pp. 494 et seq. See also *ibid.* generally in regard to the flight by balloons, rockets and man-made satellites.

[53] See the writer's 'The Right to Fly,' 42 *Grotius Transactions* (1956).

However, among parties to the 1944 Chicago Convention on International Civil Aviation, now numbering over seventy States, all aircraft, whether public or private, other than those engaged in military, customs and police services, are classified as civil aircraft.[54] Aircraft used in military, customs and police services may not fly over the territory of another State or land thereon without authorisation by special agreement or otherwise, and in accordance with the terms thereof.[55] This prohibition would appear to extend to such aircraft drifting or taxying on the surface of the water into the territorial sea of another State,[56] although not to those carried on board State ships in innocent passage[57] when no attempt is made by them to take off. An exception probably exists in favour of any such aircraft which is in distress,[58] but it would no longer be entitled to those privileges and immunities otherwise attaching to it in virtue of its public character or ownership by a foreign sovereign.[59] On the other hand, all civil aircraft, whether State-owned or State-operated, are entitled to the privileges of entry and transit conferred by the Chicago Convention,[60] as well as by other agreements concluded within the general framework of the Chicago Convention.[61]

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[54] See above, p. 233, esp. note 37.

[55] Art. 3 (c).

[56] See *loc. cit.* in note 53 above, note 8.

[57] See *ibid.*, and below, pp. 240–2.

[58] See the writer's *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 75 *et seq.*; Resolution 927 (X) of the General Assembly of the United Nations; and O. J. Lissitzyn, 'The Treatment of Aerial Intruders,' 47 A.J.I.L. (1953), p. 559.

[59] *Cf.* Art. 32 of the 1919 Paris Convention on Aerial Navigation: 'No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorisation. In case of such authorisation the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

'A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph' (Hudson, 1 *Int.Leg.*, p. 359). See further, *loc. cit.*, in note 27 above, pp. 159 *et seq.*

Regarding a United States Air Force aircraft which was driven by winds over Hungary on November 19, 1951, *cf.* the Applications by the United States instituting proceedings before the International Court of Justice against respectively Hungary and the Soviet Union, filed in the Registry of the Court on March 3, 1954.

[60] The operation of civil aircraft by States, whether directly through their governments or indirectly through wholly State-owned or partly State-owned companies, is clearly envisaged by Art. 79 of the Chicago Convention. The rights of entry and transit for non-scheduled flights are granted by Art. 5 of the Chicago Convention. *Cf.*, regarding the latter, the writer's 'Centrifugal Tendencies in Air Law,' this Annual, Vol. 10 (1957), p. 200, at pp. 209 *et seq.*

The position in international maritime law is more obscure. It would seem that, once more excluding tacit acquiescence and express consent, ships of a foreign State, whether private or public, do not have a right to enter the national waters, ports or harbours of another maritime State, except in distress.[62] However, in virtue of the 1923 Geneva Convention on the International Régime of Maritime Ports[63] and the Statute Annexed thereto, the contracting States undertake to grant to the ships of the other contracting States, whether publicly or privately owned or controlled,[64] national and most-favoured-nation[65] treatment, on a basis of reciprocity, in regard to access and use of all ports which are normally frequented by sea-going vessels and used for foreign trade.[66] But the following categories of ships are excluded from the application of the Convention:[67] (a) warships, (b) vessels performing police or administrative functions, or, in general, exercising any kind of public authority, (c) vessels for the time being exclusively employed for the purposes of the Naval, Military or Air Forces of a State, and (d) fishing vessels and their catches.

Moving outwards from national waters and ports to the territorial sea, where, under international customary law, a right of innocent passage exists in favour of foreign merchant ships, it will be found that the position of those ships excluded from the operation of the above-mentioned Convention is far from certain. However, first of all, although even this is not altogether above controversy,[68] since the term merchant ships includes fishing vessels,[69] the latter, while prohibited from fishing within foreign territorial seas, should not be denied innocent passage through them.

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[61] This applies not only to the multilateral International Air Services Transit Agreement (Hudson, 9 *Int.Leg.*, p. 228) and International Air Transport Agreement (*ibid.*, p. 232), signed at the same time as the Chicago Convention in 1944, but also other air services agreements among members of the International Civil Aviation Organisation. See further, *loc. cit.*, in note 53 above, *II—The Conventional Superstructure.*

[62] See further, *op. cit.* (1953) in note 58 above, pp. 75 *et seq.*; *loc, cit.* in note 45 above (1955), pp. 315 *et seq.*, and G. Schwarzenberger, 1 *International Law* (3rd ed. 1957), pp. 197–9.

[63] Hudson, 2 *Int.Leg.*, p. 1156.

[64] Art. 13 (1) of the Statute.

[65] Apart from the exception provided for in Art. 15 of the Statute.

[66] Arts. 1 and 2 of the Statute.

[67] Arts. 13 and 14 of the Statute.

[68] *Cf.* C. B. Selak, Jr., 'Fishing Vessels and the Principle of Innocent Passage,' 48 A.J.I.L. (1954), p. 627.

As regards warships, the controversy is of long standing.[70] The issue may be approached from two different angles. On the one hand, it is possible to say that international customary law requires the sufferance by a State of ships of all other maritime nations passing through its territorial sea, provided the passage is innocent. If so, the reason for distinguishing between warships and merchant ships may be found in the oft-quoted words of Elihu Root before the North Atlantic Coast Fisheries Arbitration Tribunal: 'Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten.'[71] But, in the *Corfu Channel Case* (Merits) (1949), the International Court of Justice held that the passage of the British flotilla through the Corfu Channel on October 22, 1946, was 'innocent,'[72] even though the subsequent sweeping of mines there on November 12 and 13, 1946, constituted an infringement of Albanian sovereignty.[73] *A fortiori*, the passage of other public ships of foreign States through the territorial sea cannot be regarded as inherently not 'innocent.' If this reasoning is accepted, States must allow foreign State vessels to pass through their territorial seas, as long as the passage is innocent. Moreover, the *Corfu Channel Case* (Merits) (1949) shows that the 'innocent' character of a voyage may be objectively verified and does not depend upon the unilateral qualification of the coastal State.

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[69] In England, *cf.* Merchant Shipping Act, 1894, s. 369 *et seq.* A perusal of United Nations, *Laws Concerning the Nationality of Ships* (1955—Addendum 1—Supplement, U.N. Doc. A/CONF.13/27, 1958), will show that this is so also in other countries.

[70] In the *Corfu Channel* case (Merits) (1949), the International Court of Justice did not find it necessary to consider the question 'whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait' (*I.C.J. Reports 1949*, p. 4, at p. 30), even though 'it is, in the opinion of the court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is *innocent*' (*ibid.*, p. 28. Original italics).

Cf. the writer's 'International Law in the United Nations,' (1954) 8 Y.B.W.A., p. 170, at p. 188.

The position of the International Law Commission in its *Final Report on the Régime of the High Seas* (U.N. Gen. Ass., *Off. Rec.*, Annexes (XI) 53) is a little ambiguous. It appears to treat the right of innocent passage as a unitary concept (Part I, Section III, Subsection A) applicable at once to merchant ships (Subsection B), State ships operated for commercial purposes or non-commercial purposes (Subsection C) and warships (Subsection D). But their status within foreign territorial waters is dealt with differently. *Cf.* below, notes 78 and 79. Moreover, the I.L.C. seems to have repudiated the proposition that foreign warships have an absolute right of innocent passage through maritime straits (*cf.* commentary to Art. 24, *loc. cit.*, pp. 25–6).

[71] 11 *Proceedings*, p. 2007.

[72] *I.C.J. Reports 1949*, p. 4, at p. 32.

On the other hand, the case of *The Schooner Exchange* v. *McFadden*[74] might, so to speak, be applied in reverse. Since no State may exercise sovereignty within the territory of another State without the latter's consent or acquiescence,[75] foreign warships and vessels exercising any kind of public authority enter the national territory only by 'implied licence.'[76] The existence of a legal duty of States under international customary law to grant such licence, coupled at the same time with the duty to allow these ships immunities from local jurisdiction, would thus have to be established independently of the right of innocent passage in favour of foreign merchant vessels. If this is correct, it may be wondered whether this very onerous burden of proof has been adequately discharged by those asserting the existence of such a duty.[77] Yet, at the same time, there is much to be said for the view that from the practice of permitting unoffending vessels of war to enjoy passage through the territorial sea, the right to withhold it has fallen into disuse, if not desuetude.[78] Here again, this would apply all the more to other State ships.

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[73] *ibid.*, at p. 35. *Cf.* also G. Schwarzenberger, 1 *International Law* (3rd ed. 1957), pp. 196–7.

[74] (1812) 7 Cranch 116 (U.S. Supreme Court).

[75] In the *Palmas* case (1928), between the Netherlands and the United States, Arbitrator Huber held: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other State*, the functions of a State' (2 UNRIAA, p. 829, at p. 838. Italics added).

The Permanent Court of International Justice (PCIJ) held in *The Lotus* (1927): 'Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State' (A 10, p. 18).

It suffices here to mention the instance of consuls who, in the absence of an *exequatur* from the territorial sovereign, may not exercise their functions. In general, States are extremely sensitive in such matters.

[76] *loc. cit.* in note 74 above.

[77] In *The Lotus* (1927), the PCIJ held that 'restrictions upon the independence of States cannot . . . be presumed' (A 10, p. 18). In a case where there was some evidence of the fact that States had frequently refrained from certain acts, the court held: 'Only if such abstention were based

Were the second view accepted, then the question may legitimately be raised whether State ships which enter foreign waters, not in virtue of this implied licence, but under the guise of merchant ships thereby implicitly waive any immunities from jurisdiction which may attach to their public character, without prejudice to the issue of State ownership or possession.[79] The same would be true of any treaty arrangement between States whereby certain categories of State ships and State aircraft are assimilated to merchant ships and civil aircraft, as, for instance, in the 1944 Chicago Convention on International Civil Aviation.[80] Thus if an aircraft belonging to and operated by the Ministry of Works of a contracting State makes use of Article 5 of the Convention to bring in, on a non-scheduled flight, a load of supplies to its diplomatic mission in another contracting State, would it still be treated as a public aircraft with all the attending privileges and immunities? If the example of section 2 of the

on their being conscious of having a duty to abstain would it be possible to speak of an international custom' (*ibid.*, p. 28). In general, it demanded a very strict degree of proof of the existence of any rule limiting the sovereignty of States.

On the strength of the *Corfu Channel* case (Merits) (1949), a right of innocent passage through maritime straits may be said to exist in favour of foreign warships, even though such straits may be within the territorial sea or seas of one or more States. But this appears to be doubted by the International Law Commission (*cf.* note 70 above).

[78] *Cf.* P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 120–3. *Cf.* also the I.L.C. *Final Report on the Régime of the High Seas,* Art. 24: 'The coastal State may make the passage of warships through the territorial sea subject to previous authorisation or notification. Normally it shall grant innocent passage subject to the observance of the provisions of Articles 17 and 18' (*loc. cit.* in note 70 above).

[79] See above, pp. 236 *et seq.*, and below, pp. 253–7.

Cf. I.L.C., *Final Report on the Régime of the High Seas,* where this solution is adopted at least in regard to Government ships operated for commercial purposes (Art. 22). The Commission 'has not taken any position' with regard to the point of the status of government ships operated for non-commercial purposes, in innocent passage through foreign territorial seas, even though it extends the right of innocent passage to them (Art. 23 and commentary thereto, *loc. cit.* in note 70 above, p. 22).

[80] See above, pp. 233 and 238.

United Kingdom Carriage by Air Act, 1932, were followed,[81] the answer might well be in the negative.

LIABILITY AS OWNER OR OPERATOR

Attention may next be directed to certain duties and liabilities of States as owners or operators of ships and aircraft. Insofar as the United Kingdom is concerned, in the matter of collision, the Collision Regulations made under the Merchant Shipping Acts[82] are not, by reason of section 741 of the principal Act applicable to ships belonging to Her Majesty.[83] However, Government ships which are registered under section 80 of the Merchant Shipping Act, 1906, are generally not, under the relevant Orders in Council, exempted from the observance of such regulations and the duty or liability which normally attaches to the owner of a ship is to be carried out or borne by the Government Department concerned.[84] In regard to Her Majesty's ships *sensu stricto,*[85] rules identical with the Collision Regulations have been incorporated in the Queen's Regulations and Admiralty Instructions.[86] In *H.M.S. Truculent,* Wilmer, J., held that 'by publishing the King's Regulations and Admiralty Instructions, it seems to me that the Admiralty have accepted on behalf of His Majesty's ships the same duty to obey the Collision Regulations as is imposed on other vessels.'[87] Furthermore, where an uncompleted aircraft carrier belonging to the Admiralty, but not yet commissioned, was involved in a collision, it was held that, although neither the Collision Regulations (1910) nor the Queen's Regulations applied to her, the Collision Regulations represented none-the-less a standard of care with which those in charge of her should have complied.[88] The Collision Regulations thus become in effect applicable to all ships belonging to Her Majesty.

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[81] See below, pp. 253 *et seq.*

[82] § 418. See the Collisions Regulations (Ships and Seaplanes on the Water) and Signals of Distress (Ships) Order, 1953 (S.I., 1953, No. 1557).

[83] Whether ships of war or ships employed in the service of any Government Department: *Young* v. *S.S. Scotia* [1903] A.C. 501.

[84] *Cf., e.g.,* the Merchant Shipping (Department of Scientific and Industrial Research Ships) Order, 1957 (S.I., 1957, No. 1878), Art. 8.

[85] See above, pp. 229–30.

[86] Chap. 35.

[87] [1951] 2 Ll. Rep. 308 at 314.

[88] *The Albion* [1953] P. 117. See above, pp. 236–7.

Prior to the Crown Proceedings Act, 1947, no action could be brought against the Crown in respect of collisions involving Crown ships. Relief had to be sought against the actual wrongdoer.[89] The question of negligence between Crown ships and between one of them and a merchant ship is substantially the same as in the case of collision between merchant ships.[90] Since the Act, the Crown is liable for torts committed by its servants or agents.[91] It does not, however, authorise proceedings *in rem* against the Crown, nor arrest, detention or sale of Crown ships or other property. Moreover, special provision is made regarding limitation of actions.[92]

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[89] *The Mentor* (1799) 1 C. Rob. 179; *The Athol* (1842) 1 W. Rob. 374; *The Volcano* (1844) 2 W. Rob. 337; *The Birkenhead* (1849) 3 W. Rob. 75; *H.M.S. Bellerophon* (1876) 3 Asp. M.C. 58; *H.M.S. Sans Pareil* [1900] P. 267; *The Hero* [1911] P. 128; [1912] A.C. 300; *The Olympic* and *H.M.S. Hawke* [1913] P. 214; *H.M.S. King Alfred* [1914] P. 84. On the issue of collisions at sea in general, see *Marsden on the Law of Collisions at Sea* (10th ed. by K. C. McGuffie, 1953).

[90] *H.M.S. Topaze* (1864) 10 L.T. 659; *H.M.S. Supply* (1865) 12 L.T. 799; but see *H.M.S. Sans Pareil* [1900] P. 267.

[91] See generally Glanville Williams, *Crown Proceedings* (1948).

[92] s. 29 (Exclusion of Proceedings *in rem*): '(1) Nothing in this Act shall authorise proceedings *in rem* in respect of any claim against the Crown, or the arrest, detention or sale of any of His Majesty's ships or aircraft, or of any cargo or other property belonging to the Crown, or give to any person any lien on any such ship, aircraft, cargo or other property.

'(2) Where proceedings *in rem* have been instituted in the High Court or in a county court against any such ship, aircraft, cargo or other property, the court may, if satisfied, either on an application by the plaintiff for an order under this subsection or any application by the Crown to set aside the proceedings, that the proceedings were so instituted by the plaintiff in the reasonable belief that the ship, aircraft, cargo or other property did not belong to the Crown, order that the proceedings shall be treated as if they were *in personam* duly instituted against the Crown in accordance with the provisions of this Act, or duly instituted against any other person whom the court regards as the proper person to be sued in the circumstances, and that the proceedings shall continue accordingly.

'Any such order may be made upon such terms, if any, as the court thinks just; and where the court makes any such order it may make such consequential orders as the court thinks expedient.'

s. 30 (Limitation of actions). See further, *loc. cit.* in note 91 above, pp. 99 *et seq.* The effect of the Act in this regard would be as follows: '(1) Collision between private vessels and warships owing to the fault of the warships. The owners of the private vessel can bring proceedings *in personam* against the Crown, and the period of limitation is one year under the rule for public authorities now contained in s. 21 of the Limitation Act; (2) Collision between warships and private vessels owing to the fault of the private vessel. The Crown is barred after the two-year period contained in the Maritime Conventions Act and now applied to the Crown by the Crown Proceedings Act; (3) Collision be-

At the same time, section 5 of the Crown Proceedings Act extends to ships belonging to Her Majesty the provisions of the Merchant Shipping Acts, 1894 to 1940, which, under certain conditions, (a) exempt the shipowner from liability for loss or damage to goods on board the ship caused by fire or for loss of or damage to undeclared valuables by robbery, embezzlement, etc, and (b) limit his liability in respect of (i) loss of life or personal injury caused to any person carried on board, or damage or loss caused to any goods, etc., on board his ship, (ii) loss of life or personal injury caused to any person in any vessel by reason of the improper navigation of his ship and (iii) loss of, or damage to, property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of his ship.[93]

The Collision Regulations at present applicable in the United Kingdom are in fact the 1948 London International Regulations for Preventing Collisions,[94] which govern *all* vessels, whether warships, public ships or merchant ships, and seaplanes of the contracting States, upon the high seas and in all waters connected therewith navigable by seagoing vessels. As regards the limitation of liability of owners of seagoing vessels, the rules have been unified as among the contracting States by the 1924 Brussels Convention,[95] which, however, is not applicable to vessels of war or other Government ships appropriated exclusively to the public service.[96] While the United Kingdom is not a party to this Convention, Government support has been given to a private member's Merchant Shipping (Liability of Shipowners and Others) Bill to implement the 1957 Brussels Convention on the

tween private vessels and civilian Government vessel not being a mail boat, owing to the fault of the latter. The evident intent of the Act is that the period of limitation should be two years. Section 30 (2), which gives the Crown the benefit of the one-year period applicable to public authorities, is expressly made subject to the provisions of the preceding subsection, which applies the two-year period to this type of claim. . . . (4) Collision between civilian Government vessel not being a mail boat, and a private vessel, owing to the fault of the latter. The two-year period applies' (p. 101).

[93] See *Temperley's Merchant Shipping Acts* (5th ed. by Sir W. L. McNair and J. P. Honour, 1954), pp. 327 *et seq.*

[94] Cmd. 8901—1953.

[95] Hudson, 2 *Int.Leg.*, p. 1332.

[96] Art. 13.

same subject which the United Kingdom is anxious to ratify.[97]

Turning now to United Kingdom aircraft belonging to or exclusively employed in the service of Her Majesty, it will be found that initially they are excluded from the application of Part VI of the Civil Aviation Act, 1949, and any enactment to which Part VI of the Act applies.[98] One of the most important consequences of this is that such aircraft are deprived of what may be called the statutory immunity of 'innocent passage' over property on land or water in the United Kingdom conferred by section 40 (1) of the Act on British private aircraft and all foreign aircraft, public or private, permitted to fly over the United Kingdom.[99] On the other hand, such aircraft would also not incur the absolute liability for surface damage imposed by section 40 (2) therein.

At present, the protection previously afforded by the Personal Injuries (Emergency Provisions) Act, 1939, in respect of damage by Crown aircraft, no longer obtains, with the termination of the 'state of emergency' occasioned by the Second World War.[1] Moreover, Crown immunity from tort liability has now been removed by the Crown Proceedings Act, 1947.[2] The liability of Crown aircraft in respect of trespass, nuisance and surface damage, as well as collision, is therefore governed by the law of torts at common law.

In this connection, it should be mentioned that, by reason of Article 69 of the Air Navigation Order, 1954,[3] all Crown aircraft, other than military aircraft, are subject to that Order, including its Second Schedule embodying the Rules of the Air and Air Traffic Control. The Second Schedule is, moreover, applicable to a military aircraft which is flown by a civilian pilot, but is not commanded by a person who is serving as a member of Her Majesty's naval, military or air forces and is detailed to command that aircraft on that occasion.[4] In so far as seaplanes on the high seas and in all waters connected therewith navigable by seagoing vessels are concerned, the International Regulations for Preventing Collisions at Sea would furthermore be applicable.[5]

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[97] *Parl. Deb., Official Report,* House of Commons, February 7, 1958, Vol. 581, col. 1569 *et seq.*, at col. 1577 *et seq.*

[98] s. 61 (1).

[99] See Lord McNair's *The Law of the Air* (2nd ed. 1953), pp. 79 *et seq.*

[1] *Cf. Billings* v. *Read* [1945] K.B. 11; *Howgate* v. *Bagnall and Another, The Times,* November 3, 1950.

[2] See above, p. 244.

[3] S.I., 1954, No. 829.

On the international level, the 1952 Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface[6] applies to aircraft operated[7] by a contracting State,[8] other than 'military, customs and police aircraft.'[9] Once more, it seems possible to maintain that by the submission of other categories of State aircraft to the Convention, the contracting States have implicitly waived any claim to immunity in their regard, at least from suit if not from execution.[10] Moreover, in view of the detailed regulation in the Convention concerning execution of judgments,[11] it might well be wondered whether even the last reservation is necessary. However, the United Kingdom has not yet ratified this Convention.

In regard to situations where there has been no express or implied waiver, foreign State ships and State aircraft enjoy immunity from local jurisdiction, either on account of their public character,[12] or by reason of their public ownership.[13] In fact, in *The Tervaete,*[14] it was held that where a ship belonging to a foreign sovereign collided with another vessel and caused damage, no liability attached to it that would revive upon its being subsequently transferred to private ownership. As Justice Holmes said in *The Western Maid* group of cases, 'legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.'[15]

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[4] Art. 69 (3).

[5] See above, p. 245.

[6] Cmd. 8886—1953.

[7] See Art. 2.

[8] Art. 23; *cf.* Art. 30.

[9] Art. 26; also see above, p. 234.

[10] See above, pp. 242–3, and below, pp. 253–7.

[11] Art. 20.

[12] *e.g., The Roseric,* 254 Fed. 154, 158, 161–2: 'The privilege was based on the idea that the sovereign's property devoted to State purposes is free and exempt from all judicial process to enforce private claims.' 'It is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such service, that exempts it from judicial process' (Collision involving a vessel requisitioned by the British Government and used as an Admiralty transport).

[13] *e.g., The Parlement Belge* (1880) 5 P.D. 197.

[14] [1922] P. 197.

Such immunity may of course be totally or partially waived in advance by express agreement. This is indeed the purpose of the 1926 Brussels Convention concerning the Immunity of State-owned ships.[16] However, neither the United Kingdom nor the United States is a party to this Convention. But it should be pointed out that, notwithstanding the immunity of States before their own or foreign courts, damage caused by ships or aircraft owned or operated by them to third States or their nationals is not without ultimate remedy.

In the first instance, a claim can be made through diplomatic channels. In the claim of the Norwegian ship *Hassel,* in respect of collision damage caused by the *Ausable,* which was under requisition by the United States Government and operated by its War Department, Secretary of State Hughes wrote to the United States President as follows: 'It seems to be generally recognised in international practice, that notwithstanding the immunity of public vessels from the judicial remedies usually obtaining with respect to other vessels, a Government should make reparation for the damages done the nationals of other countries by its public vessels.'[17] This was also the view of Counsel for Great Britain in *The Sidra* (1921) before the American-British Claims Arbitral Tribunal (1910).[18] Failing a diplomatic settlement, it is always possible, by agreement between the States concerned, to resort to international arbitration. In *The Sidra,* as well as in other cases, international tribunals have found no difficulty in sustaining the international responsibility of States for losses caused by their State ships to nationals of third States.[19] The same applies doubtless to State aircraft.

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[15] 257 U.S. (1922) 419, 433 (U.S. Supreme Court); see also *The Navemar,* 302 U.S. (1937) 669; and 303 U.S. (1938) 68.

[16] Hudson, 3 *Int.Leg.,* p. 1837.

[17] An *ex gratia* payment was made: see Hackworth, 2 *Digest,* p. 463. See also 5 *ibid.,* pp. 476–8, where the settlement of a number of claims arising out of damage caused by United States ships and aircraft is mentioned.

[18] Nielsen's *Report,* p. 452.

[19] By the same arbitral tribunal, *The Canadienne* (1914), *ibid.,* p. 427; *The Lindisfarne* (1913), *ibid.,* p. 483; and *The Newchwang* (1921), *ibid.,* p. 411. Mexican-United General Claims Commission (1923): *The Daylight* (1927), *Op. of Com.,* 1927, p. 241; 4 UNRIAA, p. 164.

WRECK AND SALVAGE

The rules concerning wreck and salvage in English maritime law are equally applicable to aircraft.[20] But they do not extend either to ships belonging to Her Majesty[21] or to aircraft belonging to or in the exclusive service of the Crown.[22] In the case of Government ships registered as British ships,[23] it is generally provided that the consent of the relevant Government Department is necessary before the powers conferred by sections 530 to 534 of the principal Merchant Shipping Act may be exercised, except in regard to lights, buoys and other matters or things necessary for the immediate protection of traffic.[24] The position of ships and aircraft belonging to a foreign sovereign is in this respect uncertain. In a pristine age of chivalry, even warships and public vessels of the enemy were often saved from shipwreck and exempted from capture,[25] though, alas, this practice is now no longer followed.[26]

As to claims for salvage services, originally no claim could be made by ships belonging to Her Majesty,[27] although the commander or crew could bring personal claims by consent of the Admiralty.[28] This situation was, however, modified by successive enactments.[29] Similarly, section 51 of the Civil Aviation Act, 1949, relating to salvage services to or by aircraft, is not applicable to aircraft belonging to or exclusively in the service of the

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[20] The rules are under the Merchant Shipping Act, 1894, ss. 510–43. For their application to aircraft, see Civil Aviation Act, 1949, s. 51.

[21] Merchant Shipping Act, 1894, s. 741; see *Christie* v. *Trinity House* (1919) 35 T.L.R. 480.

[22] Civil Aviation Act, 1949, s. 61.

[23] See above, pp. 228–9.

[24] *e.g.*, The Merchant Shipping (Department of Scientific and Industrial Research Ships) Order, 1957 (S.I., 1957, No. 1878), Art. 9.

[25] *e.g.*, in 1746, an English warship entering Havana, and offering to surrender, was allowed to repair her damage and to leave with a passport protecting her as far as the Bermudas; and during the Napoleonic Wars, an English frigate in distress off the mouth of the Loire was saved from shipwreck and permitted to leave without being captured (Hall, *A Treatise on International Law* (8th ed. 1924), p. 527).

[26] *Cf. The Dutch Pilot Vessel No. 17* (1941), decided by the Hamburg Prize Court; see Colombos, *Law of Prize* (1949), p. 185.

[27] See *loc. cit.* in note 93 above, p. 375, note 1.

[28] Merchant Shipping Act, 1894, s. 557 (1).

[29] Merchant Shipping (Salvage) Acts, 1916–40.

Crown.[30] But since the commencement of the Crown Proceedings Act, 1947,[31] and in virtue of that Act, where 'salvage services are rendered by or on behalf of His Majesty, whether in right of His government in the United Kingdom or otherwise, His Majesty shall be entitled to claim salvage in respect of those services to the same extent as any other salvor, and shall have the same rights and remedies in respect of those services as any other salvor.'[32]

Conversely, under section 8 (1) of the same Act, 'the law relating to civil salvage, whether life or property . . . shall apply in relation to salvage services rendered after the commencement of this Act in assisting any of His Majesty's ships or aircraft, or in salving life therefrom, or in saving any cargo or apparel belonging to His Majesty, in right of His Government in the United Kingdom, in the same manner as if the ship, aircraft, cargo or apparel belonged to a private person.' Previously, no claim could be made in respect of salvage services rendered to property of the Crown.[33] But even now, no claim for salvage lies against the Crown in respect of anything done to, or suffered in relation to, any postal packets which then are being carried by sea and air.[34] Moreover, action *in rem* against ships and aircraft belonging to Her Majesty is still not permitted and the arrest, detention or sale of ships, aircraft, cargo or apparel or other property belonging to the Crown, and liens against such property are excluded.[35]

Unless a foreign sovereign submits to the jurisdiction of a municipal court,[36] no claim either *in rem* or *in personam* can be enforced against ships, aircraft, or goods belonging to him,[37] even though the ship or aircraft may be engaged in commerce,[38] unless the goods, albeit the property of a foreign State, are carried at a private charterer's risk.[39] It would appear that where a ship is requisitioned by the Government after a salvage claim has attached, the action will be stayed for such time as the vessel remains under requisition.[40] On the other hand, where salvage services have been rendered to a vessel under requisition by a State, a maritime lien for salvage attaches to the ship which may be enforced once the ship is returned to its private owner, but not during the period of requisition.[41]

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[30] ss. 51 (4) and 61 (1). Again, personal claims by the crew were permitted, subject to consent by the Air Council (Aircraft (Wreck and Salvage) Order, 1938, Art. 2 (i)). See *The American Farmer* (1947), where an award was made in favour of the President of the Air Council and the crew of the Royal Air Force aircraft which had rendered the salvage services (80 Ll.L.R. 672).

[31] Crown Proceedings Act, 1947 (Commencement) Order (S.R. & O., 1947, No. 2527): the commencement date was January 1, 1948.

[32] s. 8 (2). This is not affected by ss. 51 (4) and 61 (1) of the Civil Aviation Act, 1949. See also Civil Aviation Act, 1949, s. 70 (2). The Order cited in note 30 continues in force. *Cf. loc. cit.* in note 99 above, p. 252.

[33] *Young* v. *S.S. Scotia* [1903] A.C. 501 ; *Tyne Improvement Commissioners* v. *Armement Anservois S.A.* [1947] 2 All E.R. 363.

[34] Crown Proceedings Act, 1947, s. 9 (6).

[35] See above, p. 244.

[36] *Cf. The Prins Frederik* (1820) 2 Dods. 451.

A great deal of the rules concerning salvage at sea has been made internationally uniform by the 1910 Brussels Convention on Assistance and Salvage at Sea,[42] the implementation of which in the United Kingdom has been effected by means of the Maritime Conventions Act, 1911.[43] The Convention is not applicable to warships and ships exclusively appropriated to a public service.[44] It would seem to follow that it applies to other State ships, thereby implying a waiver of immunity to that extent.[45] The Maritime Conventions Act is, however, silent in this regard. In the field of air law, there is the 1938 Brussels Convention relating to Assistance and Salvage of Aircraft or by Aircraft at Sea.[46] This Convention has not been ratified by the United Kingdom. But an interesting feature of this Convention is its Article 16. While providing that 'this Convention shall apply to government vessels and aircraft, other than military, customs and police vessels or aircraft . . .' Article 16 expressly excludes from its operation Article 13 of the Convention relating to the competent jurisdiction before which actions for indemnity or remuneration for salvage services may be brought. This is not without significance for the interpretation of similar provisions in other treaties.[47]

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[37] See *The Prins Frederik* (1820) 2 Dods. 451; *The Constitution* (1879) 4 P.D. 39; *The Parlement Belge* (1880) 5 P.D. 197; 42 L.T. 273 (C.A.).

[38] *The Porto Alexandre* [1920] P. 30 (C.A.). Reservations regarding this case were made by the House of Lords in *The Cristina* [1938] A.C. 485. See also Lord Denning's judgment in *Rahimtoola* v. *Nizam of Hyderabad* [1957] 3 W.L.R. 884 at 907.

[39] *Port Victor (Cargo ex)* [1901] P. 243.

[40] *The Meandros* [1925] P. 61.

[41] *Cf. The Broadmayne* [1916] P. 64, which involved a Crown vessel. It was said that the requisition placed the ship among 'things which are allowed to be, and from their nature must be exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from those public uses to which they are destined.'

[42] 103 B.F.S.P., p. 441.

[43] See further, *loc. cit.*, in note 93 above, pp. 343 *et seq.*, and Kennedy, *Civil Salvage* (3rd ed. 1936).

[44] Art. 14.

[45] See above, pp. 242–3, and below, pp. 253–7.

[46] Hudson, 8 *Int.Leg.*, p. 135.

In yet another Convention concluded at Brussels,[48] immunity from jurisdiction in respect of salvage claims has been waived in varying degrees for different categories of State ships, but the United Kingdom is not a party to this international agreement. In the matter of salvage as in that of collision, failing judicial remedies, it should be possible to assert a claim through diplomatic channels.[49]

CARRIAGE

Finally, a word may be said regarding certain aspects of carriage by sea and air. Under the 1924 Brussels Convention relating to Bills of Lading,[50] known generally as the 'Hague Rules,' which have been incorporated in the municipal law of a number of countries,[51] certain duties and liabilities are imposed upon the carrier by sea, as well as specific rights and immunities granted. The Convention is applicable to 'all bills of lading issued in any of the contracting States,'[52] without expressly including or excluding bills of lading issued by a carrier who is an organ of the State or of a foreign State.

This should be compared with the Carriage by Air Act, 1932, which from the standpoint of the subject under discussion presents a point of extreme interest. Just as the Carriage of Goods by Sea Act, 1924, incorporates the Hague Rules into English law, the Carriage by Air Act, 1932, gives effect to the 1929 Warsaw Convention on International Carriage by Air.[53] While Article 2 (1) of the Warsaw Convention provides that 'this Convention applies to carriage performed by the State or by legally constituted public bodies [*personnes juridiques de droit public*][54] . . .' an Additional Protocol to the Convention reserves to the contracting parties 'the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed directly by the State . . .'[55] Furthermore, Article 28 (1) of the Convention is worded as follows—

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[47] *Cf.* above, pp. 242–3, 247, and below, pp. 253 *et seq.*

[48] 1926 Brussels Convention concerning the Immunity of State-owned Ships (Hudson, 3 *Int.Leg.*, p. 1837).

[49] See above, p. 248.

[50] Hudson, 2 *Int.Leg.*, p. 1344.

[51] See Carver, *Carriage of Goods by Sea* (10th ed. by Colinvaux, 1957), pp. 1043 *et seq.*

[52] Art. 10.

> 'An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.'

On the strength of the above-mentioned provisions, section 2 of the Carriage by Air Act provides—

> 'Every High Contracting Party to the Convention who has not availed himself of the provisions of the additional Protocol thereto shall, for the purposes of any action brought in a court in the United Kingdom in accordance with the provisions of Article twenty-eight of the said First Schedule [*i.e.*, embodying the Warsaw Convention] to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that court, and accordingly rules of court may provide for the manner in which any such action is to be commenced and carried on; but nothing in this section shall authorise the issue of execution against the property of any High Contracting Party.'

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[53] Hudson, 5 *Int.Leg.*, p. 100. As regards the 1955 Hague Protocol for the amendment of the Warsaw Convention (Cmd. 9824—1956), see *loc. cit.* in note 11, p. 227, above, at pp. 220 *et seq.*

[54] The French text of the Convention is alone authoritative (Art. 36).

[55] Canada, Ethiopia and the United States are the only States which have exercised this right.

What is significant is that the Act appears to have derived the waiver of immunity from the Convention itself. It will not escape notice that (a) Article 2 (1) of the Convention does not expressly deal with the question of jurisdiction; (b) the additional Protocol merely makes it possible to exclude 'carriage by air performed directly by the State,' but not carriage performed indirectly through juristic persons of public law; (c) Article 28 of the Convention is of a limiting rather than of an enabling character; and (d) the Convention itself has neither mentioned submission to jurisdiction nor excluded the issue of execution against the property of a High Contracting Party.[56]

Section 2 of the Carriage by Air Act, 1932, to say the least, reflects the interpretation by the Legislature of existing international practice concerning the privileges and immunities of foreign State ships and State aircraft and their waiver; for it can hardly be presumed that it was intended in this instance to depart from applicable rules of international law. If this is so, this interpretation appears capable of being applied not only to carriage, but also to salvage, to collision and to other cognate issues.

CONCLUSIONS

Indeed, it is hoped that the above survey, however summary, has shown the increasing submission, in the law of England in common with the laws of other nations, of State ships and State aircraft, to the ordinary rules of law, in respect of the contractual, quasi-contractual and tortious liabilities of the Crown, even though exception has been made in regard to actions *in rem* against Crown ships and Crown aircraft and their arrest, detention or sale.[57]

While warships *sensu stricto* and military aircraft are sometimes exempted in this regard,[58] other public ships and public aircraft, moreover, have to conform to such rules as the Collision

[56] Arts. 2 (1), 28 and the Additional Protocol of the Warsaw Convention do not apply in the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952 (S.I., 1952, No. 158).

[57] See above, pp. 244 and 250.

[58] See above, pp. 229 *et seq.* *Cf.*, however, I.L.C., *Final Report on the Régime of the High Seas,* Art. 25 (*loc. cit.* in note 70 above).

Regulations and the Rules of the Air in order to ensure orderly traffic at sea and in the air.[59]

As regards foreign State ships and State aircraft, English courts, at least up to the Court of Appeal, appear to have adopted an extremely liberal attitude towards the question of their immunity from local jurisdiction, even though such ships and aircraft may be owned or operated by a trading organ of a foreign State and engaged in commerce.[60] In the recent case of *Juan Ysmael & Co. Inc.* v. *Government of Indonesia*, the Privy Council was of the opinion, however, that 'the view of Lord Justice Scrutton in *The Jupiter*[61] that a mere assertion of a claim by a foreign government to property the subject of an action compelled the court to stay the action and decline jurisdiction was against the weight of authority, and could not be supported in principle.'[62] In *Civil Air Transport Inc.* v. *Central Air Transport Corp.*[63] an Order in Council was in fact made to prevent the issue of State immunities from being raised in order to decide the question of ownership of seventy-two aircraft in Hong Kong. The House of Lords, however, has so far not had occasion to pronounce on the subject of State ships or State aircraft engaged in commerce, but the correctness of the decision in *The Porto Alexandre* was doubted by at least some of the judges in *The Cristina*.[64] In the recent case of *Rahimtoola* v. *Nizam of Hyderabad*[65] Lord Denning raised a clarion call for a re-examination of the whole issue, towards which it is hoped that this paper may serve as a modest contribution.

The twofold basis of the immunity from local jurisdiction of foreign State ships and State aircraft has already been mentioned.[66] It would appear that in respect both of property used in the public service of a foreign State and property merely in its name or possession, a foreign sovereign is in principle, under international law, entitled to immunity from suit and execution. Yet even in regard to ships and aircraft in the public service, the immunity is merely an express or tacit condition in the explicit or implied authorisation to enter the country,[67] except where the entry or transit is by a right conferred by international law.[68] There would seem to be otherwise no rule of international law which restricts the freedom of a State not to allow the entry or transit of such ship or aircraft or to stipulate a waiver of immunity when granting such an authorisation. All that can be said at present is that there is a presumption that any tacit or express licence granted to foreign warships, military aircraft and other State ships or aircraft exercising public authority, to enter the national territory implies at the same time a recognition of their immunity.

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[59] See above, pp. 243–7.

[60] *The Porto Alexandre* [1920] P. 30. See also *Baccus S.R.L.* v. *Servicio Nacional del Trigo* [1957] 1 Q.B. 438. See further Sir William L. McNair's 'Legal Aspects of State Shipping,' 34 *Grotius Transactions* (1948), p. 31.

[61] [1924] P. 236.

[62] [1955] A.C. 72.

[63] [1953] A.C. 70.

[64] [1938] A.C. 485.

[65] [1957] 3 W.L.R. 884 (H.L.).

[66] See above, p. 236.

But there does not appear to exist any corresponding practice among States in general that upholds such a presumption in favour of foreign State ships or State aircraft which enter the country under the guise of merchant ships or civil aircraft, or which are bound by internationally unified rules of private law. Many continental countries in fact presume the contrary.[69] So in fact does the Legislature in the United Kingdom, at least in one clear instance when there is an express submission of State aircraft to internationally uniform rules of private law.[70] It is submitted that this instance should be regarded not as a derogation from rules of international law, but an application thereof. If so, it might perhaps not be unreasonable to hope that, when the occasion presents itself, a similar interpretation of international law would be followed by the House of Lords. In such a case, it may also wish to follow the statesmanlike compromise arrived at by Parliament of retaining the immunity of such ships and aircraft from execution so as not to offend the dignity of the foreign sovereign, which has been stressed by many a judicial

[67] See above, pp. 241 *et seq. Cf.* also *Chung Chi Cheung* v. *The King* [1939] A.C. 160.

[68] See note 70 above.

[69] For instance, Belgium and Italy.

[70] See above, p. 254.

decision relating to this issue.[71] The many international agreements which have unified various rules of private law and made them applicable to certain categories of State ships and State aircraft should also assist in facilitating this process of subjecting them to local jurisdiction. From the standpoint of States, since their obligations and liabilities, if not decided upon by foreign courts, would still subsist to be met on the international level through diplomatic channels or international arbitration,[72] they would stand to gain but little, if they continue to insist on their immunity from suit. The solution to this thorny problem which is here suggested, not without diffidence, would thus seem, it is submitted, to harmonise the rules of municipal law with those of international law, and the interests of individuals with those of States, without detriment to justice, dignity or convenience.

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[71] *Cf. e.g.*, Sir Robert Phillimore in *The Charkeih* (1873) L.R. 4 A. & E. 59, 97, quoted with approval by Lord Cohen in *Rahimtoola* v. *Nizam of Hyderabad* [1957] 3 W. L. R. 884: 'The object of international law, in this as in other matters, is not to work injustice, nor to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice, in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State.' This passage was also referred to with approval by Lord Denning (*ibid.*, p. 913).

[72] See above, p. 248.

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THE LEGALITY OF NUCLEAR WEAPONS

Georg Schwarzenberger

The character of the issue of the legality of nuclear weapons as a current legal problem hardly needs elaboration. While Doctrine is deeply divided on the question,[1] in the United States Naval Instructions of 1955[2] and, even more confidently, the United States Army Field Manual of 1956 on *The Law of Land Warfare*, the legality of the use of nuclear weapons 'as such,' and 'in the absence of any customary rule of international law or international convention restricting their employment,' is roundly asserted.[3] By way of contrast, the long awaited Part Three of the latest edition of the British *Manual of Military Law* is still in a state of unusually prolonged gestation. It will be interesting to see whether it will merely follow the United States lead or leave the armed forces of the United Kingdom completely in the dark on the legality of the super-weapons with which they are equipped.

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[1] For qualified assertions of the *legality* of nuclear weapons, see, *e.g.*, C. Fenwick, *International Law* (1948), p. 559; Oppenheim's *International Law*, Vol. 2, (ed. H. Lauterpacht–1952), p. 351; H. Lauterpacht, 29 B.Y.I.L. (1952), p. 370; J. Stone, *Legal Controls of International Conflict* (1954), pp. 343–4; P. Guggenheim, 2 *Traité de droit international public* (1954), pp. 390–1; R. Pal, *Crimes in International Relations* (1955), p. 393; A. Verdross, *Völkerrecht* (1955), p. 378, and R. W. Tucker, *The Law of War and Neutrality at Sea* (1956), pp. 54–5, and, for assertion of the *illegality* of these weapons, *e.g.*, J. M. Spaight, *Air Power and War Rights* (1947), p. 276; E. Castrén, *The Present Law of War and Neutrality* (1954), p. 206; W. Harvey Moore in International Law Association, *Report of Edinburgh Conference* (1954), p. 21; E. Spetzler, *Luftkrieg und Menschlichkeit* (1956), p. 108 *et seq.* (with reservations); J. von Gierke, *Frankfurter Allgemeine Zeitung* (May 18, 1957), and M. Radojkovič, 8 *Review of International Affairs* (July 1 and 16, 1957). In a frequently quoted paper by J. L. Kunz (2 *Österreichische Zeitschrift für öffentliches Recht* (1950), p. 414 *et seq.*), the learned author does not appear to vouchsafe any opinion of his own on this subject (*cf.* pp. 421–2).

For an examination of the problem against a wider background, see H. A. Smith, 9 *Year Book of World Affairs* (1955), p. 222 *et seq.*, M. Fraga Iribarne, 92 *Revista de Estudios Politicos* (1957), p. 51 *et seq.*, and K. Jaspers, *La Bombe Atomique et l'Avenir de l'Homme* (1958), and for further relevant literature, *cf.* the selective bibliography in International Committee of the Red Cross, *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War* (1956), p. 164 *et seq.*

[2] Article 613: 'There is at present no rule of international law expressly prohibiting States from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted.' These Instructions are conveniently reprinted in an Appendix to Tucker, *l.c.* above note 1, p. 357 *et seq.* *Cf.* also note 9 of these Instructions, referring to Article 613, *ibid.*, p. 416.

What is considered as settled in the two United States *Manuals* constitutes our problem in chief. Do any rules of international law limit or exclude the use of all, or some, nuclear weapons in all, or at least in some, circumstances? Serious arguments for, and against, the compatibility of nuclear weapons with international law have been put forward on three different levels. Some of these centre round the sources or law-creating processes of international law. Others are perhaps not entirely self-evident abstractions from the rules of warfare. Finally, a number of individual rules of international customary and treaty law are invoked. Each of these sets of conflicting arguments calls for examination.

I—RELEVANT LAW-CREATING PROCESSES

The sources or law-determining processes[4] of the rules of warfare are sometimes thought to differ from those of the other rules of international law, that is to say, treaties, rules of international customary law and general principles of law recognised by civilised nations. Some rules of warfare at least are supposed to be based on a fourth law-creating process: the elementary dictates of humanity. If this 'source' is not understood as being limited exclusively to the rules of warfare, it is at least considered to be more prominent in this field than in others. In support of this thesis, international judgments and preambles to treaties, as well as a number of treaty clauses, are invoked. This proposition runs, however, so much counter to the preponderant evidence on the existing law-creating processes in the field of international law as to call for the closest scrutiny.

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[3] s. 35 (p. 18).

[4] On the reasons why the latter term is preferred, *cf.* the writer's *International Law,* Vol. I (1957), p. 26.

In the Judgment of the International Military Tribunal of Nuremberg (1946), it is stated that, in murdering, torturing and ill-treating prisoners of war, those responsible for these outrages had acted in 'complete disregard of the elementary dictates of humanity.'[5] Actually, deeds of this kind are prohibited by well-settled rules of international customary and treaty law. Thus, however understandable as an expression of strongly felt abhorrence, the passage cited is a clear *obiter dictum*.

In the Judgment of the *Corfu Channel* (*Merits*) case (1949), the World Court used similar language and spoke of 'elementary considerations of humanity, even more exacting in peace than war.'[6] The Court thought it wise, however, to strengthen its exposition of the law by relying in the very same sentence on two uncontroversial rules of international customary law. These comfortably carry the Judgment.[7] Moreover, although at the time of the incident the state of affairs between Albania and Greece fell short of war, the Court obligingly explained the requirements, in time of war, of considerations of humanity in corresponding circumstances. It chose as illustration Hague Convention VIII of 1907 on the Laying of Automatic Submarine Contact Mines.[8] Yet, owing to the 'as soon as possible' clause in Article 6 of this Convention, the legal obligations arising from this Convention have been treated as purely optional in a well-reasoned Award of the inter-war period.[9] In these circumstances, it would be somewhat artificial to argue that the Convention was merely declaratory of corresponding rules of international customary law or general principles of law recognised by civilised nations.

Preambles of conventions relating to the law of war are suggested as further evidence in support of the 'laws of humanity' and 'requirements of civilisation' constituting an independent law-creating process of their own. It is uncontroversial that, however meagre the contents of some of these conventions may be, their preambles—from that of the St. Petersburg Declaration of 1868 onwards—overflow with the highest humanitarian and moral sentiments.

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[5] Cmd. 6964 (1946), p. 45.

[6] *I.C.J. Reports 1949*, p. 22.

[7] See further *loc cit.*, note 4, above, pp. 51, 196–7, 340–1 and 632–4.

[8] J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), p. 151 *et seq.*

[9] Award on the *Douro* Claim in the German-Portuguese Arbitration (1930), 2 R.I.A.A., p. 1035, at p. 1064.

In accordance with generally accepted techniques of treaty interpretation, it is entirely legitimate to employ these preambles for the purpose of giving the most extensive and liberal construction to the operative articles of these conventions.[10] It appears, however, improper—because contrary to the intention of the parties to these treaties—to use these preambles for an entirely different purpose, that is to say, to treat them as if the parties to these conventions had intended to codify in these preambles the law-creating processes pertaining to the rules of warfare. Yet even if this had been their intention, to any extent to which these preambles include references to other than the three generally recognised law-creating processes, such preambles would not be declaratory of international customary law. They would represent law-making treaties, and as such apply only *inter partes* and for the purposes for which they were concluded. Within these limits, these preambles would also illustrate how non-legal considerations and standards of conduct of a high formative potency, such as postulates of individual and international morality or the standard of civilisation, can be received legitimately and 'above the counter' into international law.

The so-called de Martens Clause in the Preamble to the Hague Conventions on Land Warfare of 1899 and 1907 is a typical illustration of the uses and abuses to which such clauses can be put. On the suggestion of de Martens, one of the Russian delegates at both Hague Peace Conferences, the Parties drew attention in the Conventions themselves to the dangers which would result from misinterpreting these Treaties as if they constituted a complete codification of the laws of war. They, therefore, declared expressly that, until such a codification had come into force, in all cases not expressly covered by the Regulations on Land Warfare, the inhabitants and the belligerents should remain under the protection of the 'principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.'[11]

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[10] See further *loc cit.*, note 4, above, p. 526 *et seq.*

As becomes apparent from the history of this Clause, its purpose was to forestall an unintended and cynical argument *a contrario*. Because the Regulations on Land Warfare were not exhaustive, the Parties wished to avoid the interpretation that anything that was not expressly prohibited by these Regulations was allowed. If rules of international customary law imposed legal restraints regarding topics which were not regulated by the Regulations, these prohibitions remained in force. If the laws of humanity or the dictates of the public conscience had led to the creation of rules of warfare in the form, for instance, of general principles of law recognised by civilised nations, such rules were not affected by the acceptance of the Hague Regulations on Land Warfare. What, however, this Clause was not meant to settle with binding force for the Parties was how rules of warfare came into existence. Its only function was to preserve intact any pre-existing rules of warfare, on whatever law-creating process they happened to rest.

For a similar purpose, Article 22 was inserted into the Hague Regulations on Land Warfare of 1899 and 1907. This Article stipulated that 'the right of belligerents to adopt means of injuring the enemy is not unlimited.'[12] Again, this Article was intended to serve notice that the Articles of the Regulations which immediately followed were incomplete, and that any restrictions which were imposed by other rules of warfare remained intact. The Article was meant as a reminder of these already existing limitations of the discretionary powers of belligerent States. It was not supposed to add unspecified limitations of a substantive character to these restrictions.

Thus, on the level of the law-creating processes of the rules of warfare, it appears impossible to discover any automatic limitation of the freedom of the subjects of international law to possess, test or use nuclear weapons.

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[11] *loc. cit.* note 8, above, pp. 102–3.

[12] *ibid.*, p. 116.

II—RELEVANT LEGAL PRINCIPLES BEHIND THE LAWS OF WAR

It is frequently thought that the use of nuclear weapons of a calibre, or in circumstances, which exclude distinction between enemy combatants—or, at least, enemy military objectives[13]—and the civilian population is necessarily illegal. The argument is based on abstractions from a number of relevant rules of warfare. The asserted legal principle or rationale of the rules of warfare is to the effect that, whatever may still constitute this elusive group, the civilian population as such is not a legitimate object of warfare.

In addition to the Hague Conventions of 1899 and 1907 and the Geneva Red Cross Conventions of 1929 and 1949, the Preamble of the St. Petersburg Declaration of 1868 has been invoked as direct evidence of this legal principle.

Among the considerations which, in the St. Petersburg Declaration, were stated as having induced the Parties to renounce the use of projectiles of a weight *below* 400 grammes which are either explosive or charged with fulminating or inflammable substances, it was mentioned that the 'only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.' Therefore, projectiles which were so small as *not* to 'disable the greatest possible number of men' were considered to be disproportionately cruel. Subsequently, this humanitarian thought did not prevent belligerent States from considering as entirely legal the use of hand grenades, because they were not projectiles, and of projectiles which, beyond doubt, fell into this category, but were used in air warfare.[14] Such a clause in a Preamble the potentialities of which have hardly been exhausted in order to attain the most liberal interpretation of the very same Convention[15] is somewhat doubtful evidence for purposes of overall generalisation.

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[13] In Article 2 of Hague Convention IX of 1907 on the Bombardment by Naval Forces in Time of War, these were still narrowly circumscribed as 'military works, military or naval establishments, depots of arms or war *matériel,* workshops or plant which could be utilised for the needs of the hostile fleet or army, and the ships of war in the harbour' (Scott, *loc. cit.* note 8, above, pp. 157–8).

In Article 24 of the draft Rules of Aerial Warfare of 1923 (Cmd. 2201 (1924), p. 27), the term *military objective* is actually used and defined as an 'object of which the destruction or injury would constitute a distinct military advantage to the belligerent.' Compared, however, with the list in Article 2 of Convention IX of 1907, the categories of military objectives which are specifically enumerated have been considerably enlarged.

In the attempt to prove the existence of the principle of the protection of the civilian population as such, a tendency is also noticeable to over-simplify the functions of some of the rules used in evidence. Two sets of rules which serve very different purposes must be kept apart. While the one establishes a distinction between members of armed forces and civilians, the other differentiates between combatants and non-combatants. The one makes possible differentiation in the treatment of three classes *after* they have come under enemy control: privileged prisoners of war, non-privileged prisoners of war and the civilian population of occupied enemy territories. The other provides for the distinction between combatants and non-combatants *before* they come under effective enemy control, that is to say, in fighting zones.

The rationale of the first set of classificatory and differentiating rules is not necessarily either the protection of the civilian population or that of non-combatants as such. Admittedly, these rules exclude or limit in varying degrees the application of force and restraints against the greater part of the enemy armed forces and civilian population which come under enemy control. At the same time, this threefold division assists in sorting out in the interest of the occupying power a third class of individuals, including spies, war criminals and *franc tireurs,* to whom, under international customary law, most of the privileges granted to the other two categories are denied.

Looked at from the point of view of the belligerent State in control of these individuals, these divisions serve primarily its own security interests. They are eminently suited for separating the sheep from the goats. For this purpose, it is essential to isolate the most dangerous class, that is to say, unprivileged prisoners of war from the rest and, subject to minor limitations in the exercise of this discretion, to permit the Detaining Power to deal with them as it sees fit. The function of the rules of international customary law which protect even non-privileged prisoners of war is to assure at least that an individual alleged to be in this class actually belongs to it. Yet, even privileged prisoners of war still require detention in conditions which prevent them from interfering with the war effort of the Detaining Power behind the lines or from rejoining their own forces. Finally, the relative freedom from restraints of the civilian population of enemy-occupied territories is as much in the interest of the occupying Power as of the civilian population. Nothing would tax more the resources of a belligerent State than to have to intern the whole, or substantial portions, of this population and to become responsible for their maintenance. However much such civilians may benefit from being allowed to continue with most of their peacetime activities, the inevitable benefit to the occupying Power which results from these pursuits should not be underestimated. It therefore appears highly doubtful whether this set of rules can really claim as its only or chief rationale the protection of non-combatants or the civilian population.

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[14] See further Spaight, *loc. cit.,* note 1, above, p. 197 *et seq.,* and Stone, *loc. cit.,* note 1, above, pp. 551–2, 608 and 615. *Cf.* also Article 18 of the Draft Rules of Aerial Warfare of 1923, *loc. cit.,* note 13, above, p. 24.

[15] See above, p. 261 *et seq.*

The other set of rules on the distinction between combatants and non-combatants is based on two assumptions which apply today very much less than when these rules came into force. The one is that the permanent object of warfare, that is to say, the imposition of the victor's will on the defeated enemy, can be attained by the defeat or surrender of the enemy's armed forces. The other is that civilians in fighting zones only are accessible as potential objects of warfare. They can, therefore, be ignored as *quantité négligeable* or may even have to be treated in this way to prevent panic on their part and resulting risks to military operations in progress. Thus, it is arguable that the exemption of civilians from the scope of intentional objects of warfare has been due to the mutual interest of belligerent States in their armed forces not being disturbed in the task of checkmating each other or to the irrelevance *sub specie belli* of this portion of the civilian population at least as much as to humanitarian considerations.

Beyond this, a growing body of more recent evidence exists which tends to make it increasingly difficult still to maintain that, in principle, the whole of the civilian population is immune from intentional attack. Since long distance artillery and air warfare —not to speak of intermediate and inter-continental missiles—have made the enemy hinterland accessible as a target of attack, the concept of non-combatants has become subject to a remarkable process of shrinkage. Correspondingly, the notion of the military objective has become so inflated, and the definition of these objectives so comprehensive, as to suggest the advisability of concentrating on a definition of non-military objectives and treating everything else as legitimate military objectives. The practice of belligerent States in the Second World War and the trends in relevant post-1945 treaties suggest that the immunity of the civilian population from intentional attack is reaching vanishing point. As the irony of fate would have it, the British Directive on Air Warfare of October 29, 1942, buried in one of the volumes of the United States Air Force History,[16] received its maximum publicity through a document recently distributed by the International Red Cross Committee. Under this Directive, bombardment was, in principle, limited to military objectives, and the intentional bombardment of civilian populations, as such, was forbidden. Yet, with the exception of the Geneva Red Cross Conventions, none of these limitations applied to German, Italian or Japanese territories, for 'consequent upon the enemy's adoption of a campaign of unrestricted air warfare, the Cabinet have authorised a bombing policy which includes the attack on enemy morale.'[17] Thus, in fact, the rule laid down applied only to enemy-occupied British and Allied territories. The exception, however, covered the whole of the enemy countries. Similarly, in the Casablanca Directive of January 21, 1943, the Combined Chiefs of Staff defined as the objective of the bomber offensive against Germany from the United Kingdom the 'progressive destruction and dislocation of the German military, industrial and economic system, and the undermining

[16] W. F. Craven and J. L. Cate, *The Army Air Forces in World War II*, Vol. 2 (1949), p. 240.

[17] The International Red Cross Committee, *loc. cit.* note 1, above, p. 163.

of the morale of the German people to a point where their capacity for armed resistance is fatally weakened.'[18]

It is significant that, in the British Directive, the bombing policy adopted is not justified on the ground of reprisals, but based merely on a *tu quoque* argument. It is even more relevant that neither the Indictment leading to the trials of the German major war criminals before the International Military Tribunal at Nuremberg nor the Judgment itself deals expressly with the question of the legality of German air warfare or the most indiscriminate of all then known forms of warfare, that is to say, the German V-weapons. The International Military Tribunal for the Far East showed similar inhibitions about making findings on the legality of Japanese air warfare.[19]

Even more disturbing are the results of the analysis from this point of view of the relevant Articles in the International Red Cross Conventions of 1949,[20] the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict[21] and the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, issued by the International Committee of the Red Cross.[22] Examination of these texts reveals the rout of the principle of the protection of the civilian population in the face of the necessities of war, as conceived in terms of near-total warfare. To judge by this evidence, it must now be regarded as understood in governmental and military quarters that the scope of legitimate objects of warfare is considerably wider than combatants and includes somewhat indefinite categories of civilians engaged in war work. Moreover, legitimate target areas are no longer limited to military objectives, even if these are understood in a very liberal sense, but extend to centres of communications, large industrial and administrative establishments of any kind and any area likely to become important for the conduct of war. Thus, at present, the principle of the protection of the enemy civilian population appears to apply at the most in favour of a residue of persons who fulfil two conditions. They must not be connected with the war effort and be remote from important target areas.

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[18] *loc. cit.*, note 16, above, Vol. 2, p. 305.

[19] See further *loc. cit.* note 4, above, Vol. II, Part Six.

[20] *Cf.* the Draft Agreement on Hospital and Safety Zones and Localities, Annex I to Convention IV and J. S. Pictet's official *Commentaire* (1956), p. 672 *et seq.*

[21] Cmd. 9837 (1956).

[22] List of Categories of Military Objectives in International Committee of the Red Cross, *loc. cit.* note 1, above, p. 72 *et seq.*

If the principle of the immunity of the enemy civilian population is limited to those categories of the civilian population who, from the point of view of the war effort, are irrelevant and are located in areas of which the same can be said, this principle appears to represent a correct, but hardly significant, abstraction from the relevant rules of warfare. It marks what little remains of a border line between legitimate warfare and complete relapse into the barbarism of total war.

As we are told, one ten-megaton weapon has five times the explosive power of all bombs dropped on Germany during the Second World War, and one hundred times that of all those released over Japan.[23] If, therefore, a nuclear weapon of a size which did not allow for the protection of at least this absolutely peaceful and, from the point of view of the war effort, negligible residue of the civilian population were used, or any weapon, including nuclear weapons, were intentionally employed against civilians in this category, any such use of nuclear weapons would amount to an illegal form of warfare and the commission of a war crime in the technical sense of the term.

III—RELEVANT INDIVIDUAL RULES OF INTERNATIONAL LAW

In considering individual rules of international law which are potentially relevant to our discussion, it is necessary to distinguish between three aspects of the problem: the legality of the use, the possession and the testing of nuclear weapons.

THE USE OF NUCLEAR WEAPONS

It appears generally accepted that any use of nuclear weapons necessarily has blast, heat and radiation effects.[24] It is more difficult to establish whether nuclear explosions involve also necessarily the production and emission of poisonous substances or gases, or whether those who express themselves in this way[25] equate the effects of radiation with those of poisonous substances or gases. If any of these issues ever came before an international court or a war crime tribunal, it would be treated as a question of fact and decided on the basis of expert evidence. For purposes of this paper, it suffices to deal with any relevant facts of a controversial character as *non-proven* hypotheses and to discuss on this footing the legal problems involved. In relation to these facts and hypotheses, a number of potentially applicable rules of warfare call for consideration.

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[23] H. A. Kissinger, *Nuclear Weapons and Foreign Policy* (1957), pp. 70–1.

[24] See, for instance, the Report of the British Mission to Japan on *The Effects of the Atomic Bombs at Hiroshima and Nagasaki* (1946); Home

(a) The Prohibition of the Use of All Nuclear Weapons. The relevant rules will be considered under three headings—

(1) *The Prohibition of the Use of Poison and Poisoned Weapons.* The use of poison and poisoned weapons is prohibited by two well established rules of international customary law. In

Office and Scottish Home Department, *Nuclear Weapons* (1956); British Medical Research Council, *The Hazards to Man of Nuclear and Allied Radiations* (1956), and United States Atomic Energy Commission, *The Effects of Nuclear Weapons* (1957).

[25] See, for instance, Castrén, *loc. cit.*, note 1, above, p. 207; International Committee of the Red Cross, *Summary of the Opinions expressed by the Experts* (Commission of Experts for the Legal Protection of Civilian Populations–1954), p. 3; Report by the Advisory Working Party of Experts on the *Legal Protection of the Civilian Population* (1956), p. 40; Einstein's remark on 'radioactive poisoning of the atmosphere' in Lok Sabha Secretariat, New Delhi, *Atomic and Hydrogen Weapons, Comments and Reactions, 1954–55* (1956), p. 65, and the express reference to 'mass poisoning' as one of the effects of the use of nuclear weapons in the Final Act of the London Conference of 1954 (see *loc. cit.* note 84, below).

Before the Disarmament Sub-Committee of the Senate Foreign Relations Committee, Dr. Libby, scientific member of the United States Atomic Energy Commission, testified on March 6, 1958, on the effects of the explosion of a hydrogen bomb of 1.7 kiloton, endearingly termed a 'little fellow.' In the course of this testimony, he stated that 'among the radio-active products of a bomb are some gases, krypton, for example, and zenon, which have no chemical formulas. These things are permanent gases.' (*The Manchester Guardian,* March 15, 1958.)

If it were established that these gases were poisonous, a judicial institution would probably attach importance to both the absolute quantity of poison gas discharged in any explosion and the relative significance of this effect as compared with other effects of nuclear explosions. The greater the absolute quantity of poison gas, the less relevant would be the relatively subordinate character of this effect as compared with others produced by such explosions.

particular, since the codification of these rules under one and the same heading in Article 23 (a) of the Hague Regulations of 1899 and 1907,[26] they are formulated usually as one rule with two branches. It is doubtful whether this is advisable, for the *ratio* behind these rules is not necessarily the same. While poison is normally administered in a secretive manner, poisoned weapons may be openly employed.[27]

Consultation of standard textbooks and military manuals on the meaning of poison and poisoned weapons further confirms how little explored this field is. Definitions excel by their absence. Thus, no choice exists but to fall back on the ordinary meaning of these words. Etymologically, the derivation of 'poison' from *potio* might suggest a limitation to substances which are transmitted in fluid form. Yet, a mere glance at the Latin and German equivalents of the term makes it difficult to pay much attention to this argument. In any case, in accordance with the general rules of inter-temporal law,[28] the present-day meaning of these terms is ultimately decisive. In contemporary usage, the term covers—and not only in English—any substance that 'when introduced into, or absorbed by, a living organism destroys life or injures health.'[29] This excludes death or injury to health by means of force, whether the cut of a sword, the thrust of a spear, the piercing of the body by an arrow or bullet, or injury inflicted by explosion or blast. Thus, it is little in doubt that the blast effects of nuclear weapons are not covered by the prohibition of the use of poison.

It would be less justified to dismiss similarly out of hand the possibility that the rule on the prohibition of the use of poison might govern at least the heat and radiation effects of nuclear weapons and the contamination caused by their fall-out. It is probably permissible to treat heat and radiation as substances. If any of these substances were introduced into the body in sufficiently large doses, they would destroy life or injure health. In any case, this is true of radio-active fall-out. Thus, without invoking even the possibility of the necessary production of poison gas by nuclear explosions,[30] a *prima facie* case appears to exist for regarding the use of nuclear weapons as incompatible with the prohibition of the use of poison. It is, however, necessary to check this finding by reference to the *ratio* behind the rules on the prohibition of the use of poison and poisoned weapons. More or less articulately and convincingly, a number of such reasons have been advanced and, as will be seen, views on this subject have changed even in fairly recent times.

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[26] Scott, *loc. cit.* note 8, above, p. 116. See also below, pp. 272 and 276.
In Article 8 (a) of the *Manuel des lois de la guerre sur terre*, adopted in 1880 by the *Institut de Droit International*, the prohibition of the use of poison is already stated in one comprehensively drafted rule: *'Il est interdit* (a) *de faire usage du poison, sous quelque forme que ce soit'* (*Résolutions de l'Institut 1873–1956* (1957), p. 184). *Cf.* also Article 16 (1) of the Institute's *Manuel des lois de la guerre maritime* of 1913 (*ibid.*, pp. 234–5).

[27] See below, p. 271 *et seq.*

[28] See *loc. cit.* note 4, above, p. 21 *et seq.*
Actually, it appears that, already in the formative stages of these rules, poisons in solid form were well known. *Cf.* Sir Henry Sumner Maine, *International Law* (1915), p. 135.
See also below, p. 272 *et seq.*

[29] *Shorter Oxford Dictionary.*

Secretiveness could be the explanation of the prohibition of the use of poison, but would hardly account for the open and avowed use of poisoned arms. Following a strong naturalist tradition, Hall advanced the inevitability of death as *the* reason of the rule.[31] Oppenheim accepted this explanation as the first of two reasons, the second being the unnecessary suffering caused by poisoning.[32] Since the fifth edition,[33] Oppenheim's Editor has jettisoned the first in favour of the second reason. As is apparent from the successive editions of Oppenheim up to, and including, the fifth edition, this two-barrelled *ratio* is the result of a slip of the Master in the first edition, which escaped discovery until the sixth edition.[34] Somehow, Oppenheim had been under

[30] See above, p. 269.

[31] *International Law* (1st ed. 1880–8th ed. 1924), para. 185. See also below, p. 274.

[32] *International Law* (1906), Vol. II, para. 110.

[33] Ed. H. Lauterpacht (1935).

[34] Ed. H. Lauterpacht (1940).

Subconsciously, this error may have been facilitated by a line of thought which can be traced back at least to Vattel, *Le Droit des Gens* (1758–Vol. II, Bk. III, Chap. VIII, Para. 156), that the use of poisoned arms is not called for by the necessities of war and, therefore, amounts to unnecessary cruelty. On the authority of this argument, the rules on the prohibition of the use of poisoned weapons and the infliction of unnecessary suffering are treated together in the first edition of the *British Manual of Military Law* (1884) which, for the 1914 edition, it subsequently fell to Oppenheim to revise in collaboration with Major General Edmonds.

the impression that Article 23 (e) of the Hague Regulations prohibited the use of poison and poisoned weapons as well as weapons calculated to cause unnecessary suffering. Actually, the one prohibition is contained in Paragraph (a) of this Article, and the other in Paragraph (e). When Oppenheim was engaged in revising the second edition of his textbook on the basis of the text as it stood, he himself appears to have found it difficult to understand the meaning of the first *ratio* and considered its elimination.[35]

The reason why so much attention is paid to divergencies in, and mutations of, the *ratio legis* of this rule is twofold. The treatment of this subject in the Doctrine of international law is an object-lesson in the degree of subjectivity, including error, that may creep into the formulation of any *ratio legis*. Moreover, the *ratio legis* is an important, if not the overriding, reason for allocating individual rules of warfare to one, rather than another, type of the rules of war. In its turn, this may be decisive for accepting or rejecting the proposed extension of a rule to a new weapon. If, as the available material appears to suggest, the rules of warfare are divided into those which, without coming into conflict with the necessities of war, require compliance with the standard of civilisation; those which, although conflicting with necessities of war, give priority to the standard of civilisation; those which represent a genuine compromise between both, and admonitory rules which fall short of setting limits to the necessities of war, it becomes apparent that it makes all the difference whether, as Oppenheim would have it, the rules on the prohibition of the use of poison and poisoned weapons belong to the first category or one of the other three types of the rules of war.

Considering the importance of these rules in relation to the legality of nuclear weapons, it appears advisable to obtain a better comprehension of their meaning, and the commensurate 'reasons' behind these rules, by means of an independent inquiry into their origins and evolution.[36] It is fairly clear that, until

[35] *Cf.* note 4 to Para. 110 of the 4th ed. (ed. A. D. McNair–1926).

[36] In this paper, this can be done only in outline. To follow up these hints, with particular reference to the dates when these rules were gradually

the fifteenth century, the European law of nations did not know of any rules prohibiting in warfare the use of either poison or poisoned weapons.[37] Conversely, little doubt exists that, by the beginning of the eighteenth century, if not earlier, these rules came to form an accepted part of the laws of war as applied between the civilised nations of Europe.[38] These dates encompass the formative period of these rules. It is possible that, by more detailed research, it can be further narrowed down. It is, however, advisable to proceed with caution. When, in 1589, Alberico Gentili published the second of his *Commentationes de Jure Belli,* he defended vigorously the prohibition of the use of poison and poisoned weapons in warfare, but treated the issue as still controversial.[39] But a generation later, Grotius was prepared to concede the legality of the use of poison only in natural law. At the same time, he insisted that at least the most civilised nations had renounced for a long time this form of warfare. Yet, to judge by the evidence which Grotius adduced for these rules having been accepted 'of old' if not by all, then at least by the most advanced nations, it would appear that he was thinking rather of the distant past of antiquity than of more recent European practice.[40]

The very number of reasons, no less than nineteen, which Gentili considered it necessary to adduce in favour of these rules is itself some indication of the amount of justification he thought still necessary. Among these figures the clandestine character of the use of poison, if not of poisoned weapons, as well as the cruel, dishonourable and malicious nature of fighting in this manner.

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incorporated into the Articles of War of the leading Powers of Europe and their manuals of military law, and treaties on the extradition of those guilty of the use of poison even in time of war between the parties were concluded, would be likely to result in a worthwhile piece of post-graduate research.

[37] Cf. R. Ward, *Foundation and History of the Law of Nations in Europe* (1795), Vol. I, pp. 151–2.

[38] On seventeenth century practice and doctrine, *cf.* G. F. de Martens, *Précis du droit des gens moderne de l'Europe* (1801), Para. 273.

[39] To the same effect his *De Jure Belli Libri Tres* (1612), Book II, Chap. VI, p. 256.

[40] *De Jure Belli ac Pacis Libri Tres* (1625), Bk. III, Chap. IV, Para. XV (1). So late as the middle of the eighteenth century, Bynkershoek still advocated the legality of the use of poison in warfare (*Quaestiones Juris Publici Libri Duo* (1737), Bk. I, Chap. I, p. 3).

Also the argument which, in the inter-war period between 1919 and 1939, no longer seemed to make sense,[41] was lucidly made. Because the slightest contact of poison with the blood was thought to cause death, that is to say, the utter destructiveness of this weapon, Gentili considered its use at the most legitimate in wars of extermination.[42] It is not surprising that, after the holocaust of the First World War, and at a time when an even worse war to come was already visualised in terms of hardly limited air warfare,[43] Gentili's argument, if still comprehensible at all, appeared dated. By then, much more cruel and deadly weapons had become generally accepted as legitimate, because they were not covered by any prohibitive rule. If this was so, this development also reduced to practical meaninglessness the other *ratio* of the rule on the prohibition of the use of poison, that is to say, the avoidance of unnecessary suffering.[44] Still, provided that weapons were not poisoned, both Gentili and Grotius would probably have concurred with the view that, whatever other limitations they might have considered applicable to twentieth century uses of force, the prohibition of the use of poison could not cover these forms of warfare. Any other reason apart, the rule on the prohibition of the use of poison rested on the naturalist conception of war as a contest or state in which those concerned attempted to settle their differences by force, and naturalists sharply distinguished between force and devices such as poison.

Gentili was fully aware of the fact that his various arguments did not all carry equal weight, but thought their cumulative effect fairly conclusive. The first of these is a pointer to the true *ratio legis,* which is but obscured by some of the less convincing grounds that follow. It is that the use of poison is prohibited because it is a weapon typical of savages and barbarians. When, in the end, Gentili dealt with incantations and magic arts, which he included under the head of poisons,[45] he again took up this point and argued that these artifices were unlawful 'because war, a contest between man, through these acts is made a struggle of demons.'[46] In other words—to be found already in Barbeyrac's translation of a passage on poisoning in Grotius's *De Jure Belli ac Pacis*[47]—the most civilised nations refrain from the use of these weapons. Their use runs counter to the standard of civilisation as understood by these sixteenth and seventeenth century humanists.

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[41] See above, p. 271.

[42] *loc. cit.* note 39, above, p. 250.

[43] Not even the already fairly wide definition of military objectives in the draft Rules of Aerial Warfare of 1923 could induce the Powers to transform this draft into a binding convention. See above, p. 263, note 13.

[44] See above, p. 271, and below, p. 281 *et seq.*

[45] It is significant that this usage of the term would not even limit poison to matter or substance. See above, p. 270.

The number of illustrations drawn from antiquity in the relevant chapters of the works of both Gentili and Grotius indicate how strongly the formation of the rules on the prohibition of the use of poison and poison gas was inspired by the rediscovery during the Renaissance of this heroic tradition. Yet, other and more earthbound influences also helped in shaping these rules. The anti-Borgia propaganda, first used by an ultimately successful faction in the Vatican and their lay confederates and then employed for anti-Popish purposes in general could only gain in impetus by the assertion of the villainy and illegality of weapons used by this admittedly unholy family. Moreover, the mercenaries who hired out their services to the highest bidder could not but look with professional disfavour at weapons which deprived them of a sporting chance to escape death if, in battle, they were not killed outright, but merely lightly wounded. To them, the inevitable fatality of a poisoned wound was as good a reason as any why the use of this weapon was unprofessional. Yet, theirs was not the only trade union. Princes at large considered that poison was a weapon against which, even when they were in the midst of powerful armies, they were largely helpless. In a remarkable *Cui bono* argument, Grotius explained in this way the origin of the rule on the prohibition of the use of poison.[48]

Do any of these reasons for the rule on the prohibition of the use of poison apply to the heat, radiation and fall-out effects of nuclear weapons? The fact that modern practice in war has not applied this analogy to the use of fire by way of flame-throwers, napalm and incendiary bombs or fire storms caused by saturation bombing may suggest that the heat effects of nuclear weapons should be assimilated to the use of force rather than to that of poisonous substances. Conversely, a fairly strong case can be made for the assimilation of radiation and radioactive fall-out to poison. If introduced into the body in sufficiently large doses, they produce symptoms which are indistinguishable from those of poisoning[49] and inflict death or serious damage to health in, as Gentili would have put it, a manner more befitting demons than civilised human beings.

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[46] *loc. cit.* note 39, above, p. 261 (transl. J. C. Rolfe).

[47] Basle edition of 1768.

[48] *loc. cit.* note 40, above, Para. 15 (2).
Vattel extended the argument so as to explain the prohibition of the use of poison by the interest and security not only of princes, but military commanders at large (*loc. cit.*, note 34, above, Para. 155).

The fact that, in other respects, contemporary warfare largely ignores the standard of civilisation or fixes it so low as to reduce it to irrelevance does not appear to invalidate this conclusion. However regrettable, the use of *force* is not limited sufficiently by rules which unequivocally prohibit the use of even the most destructive of these weapons. By way of contrast, the rules on poison and poisoned weapons contain applicable prohibitions.

The incorporation of both these rules into the Hague Regulations on Land Warfare of 1899 and 1907 may be taken as merely declaratory of these rules of international customary law. It has, however, been asserted that, in the light of the preparatory material, Article 23 (a) of these Regulations must be limited to acts of secret poisoning which endanger indiscriminately combatants and the civilian population.[50] If the practice of the World Court of refusing to undertake the interpretation of texts which, at least on the surface, are clear,[51] is any guide, this argument can be ignored. In any case, the contents of the two rules of international customary law on the subject are not so restricted. In the absence of evidence to the effect that, by desuetude, they have been correspondingly narrowed, they would not be affected by any more restrictive formulation in these Conventions. At this point, the de Martens Clause in the Preambles to the Hague Conventions of 1899 and 1907 on Land Warfare comes into its own and fulfils its appointed function.[52]

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[49] United States Atomic Energy Commission, *The Effects of Nuclear Weapons* (1957), p. 473.

[50] P. Guggenheim, 3 *Handwörterbuch des Völkerrechts* (1929), p. 466.

Actually, the available *travaux préparatoires* of the Hague Peace Conferences of 1899 and 1907 appear to indicate merely that Article 23 (a) of the Hague Regulations on Land Warfare of 1899 was to correspond to the formulation of this prohibition in Article 13 (a) of the draft Declaration of Brussels of 1874 (Report by the Rapporteur to the Second Commission of the Peace Conference of 1899–J. B. Scott, *Rapports faits aux Conférences de La Haye de 1899 et 1907* (1920), p. 145). *Cf.* also Enclosure 1 to Sir J. Pauncefote's Report to the Marquess of Salisbury, July 6, 1899 (C. 9534–1899, p. 125, at p. 128), and Baron de Gieslingen's Report at the Hague Conference of 1907 (Scott, *loc. cit.* above, p. 521 *et seq.*) and the correspondence regarding the Brussels Conference of 1874 (65 B.F.S.P. (1873–74), p. 1004 *et seq.*, and, in particular, pp. 1007 and 1061, and C. 1128 (Parl. Papers 1875).

(2) *The Hague Declaration on Asphyxiating Gases of July 29, 1899.* By this Declaration, the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases is prohibited.[53] While Russia and the United Kingdom are parties to the Conventions, the United States of America is not. Irrespective of this, it cannot be said that the diffusion of any gases is either the *sole* or *any* object of the use of nuclear weapons.

(3) *The Geneva Protocol of June 17, 1925.* By this Protocol, Parties which are not already bound by treaties prohibiting the use in war of 'asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices' accept this prohibition and extend it to the use of bacteriological methods of warfare.[54] Thirty-nine States are parties to the Protocol.[55] A number of these, including the members of the British Commonwealth which are parties to the Protocol and the Soviet Union, have added reservations to their acts of ratification or accession regarding States which are not bound by the Protocol or fail to respect its provisions. The United States is the most prominent of the non-parties.

If it could be established that the use of all nuclear weapons involved necessarily the discharge of gases enumerated in the Protocol,[56] it would settle matters conclusively between the Parties to the Protocol. Even if this were not so, the words 'all analogous liquids, materials or devices' are so comprehensively phrased as to include any weapons of an analogous character, irrespective of whether they were known or in use at the time of the signature of the Protocol. If the radiation and fall-out effects of nuclear weapons can be likened to poison,[57] all the more can they be likened to poison gas which is but an even more closely analogous species of the genus 'poison.' For the same reason, the prohibitions of chemical and bacteriological warfare contained in the Protocol must be taken to be merely declaratory of international customary law and equally binding on all States. It, then, becomes irrelevent whether any particular State is a party to the Geneva Protocol of 1925.[58]

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[51] See further *loc. cit.* note 4, above, p. 498 *et seq.*
For a recent reaffirmation of this judicial policy, *cf.* the Franco-Spanish Arbitration on *Lac Lanoux* (1957), *Sentence Arbitrale: 'Les dispositions claires du droit conventionnel n'appellent aucune interprétation'* (p. 34).

[52] See above, p. 261 *et seq.*

[53] *loc. cit.* note 8, above, p. 225.

[54] Cmd. 3604 (1930), p. 2.

[55] Excluding Estonia, Latvia and Lithuania. *Cf.* the list in the *Collection of Constitutional Texts concerning the Legal Protection of Populations from the Dangers of Aerial Warfare and Blind Weapons*, published by the International Committee of the Red Cross (1954), p. 61.

(b) Exceptions to the Prohibition of the Use of Nuclear Weapons. Assuming that, in principle, the use of all nuclear weapons is prohibited, possible exceptions to this rule have to be considered. The use of nuclear weapons in self-defence and by way of reprisals are the most important of a number of relevant qualifications.

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[56] See above, p. 269.

[57] See above, p. 271.

[58] For a similar conclusion, but based on the cumulative evidential character of relevant statements in a number of drafts, treaties imposing legal obligations on *individual* Powers, and political pronouncements of the post-1919 period, *cf.* Oppenheim's *International Law* (ed. H. Lauterpacht), Vol. II (1952), p. 344.

Article 171 of the Peace Treaty of Versailles of 1919 and the corresponding Articles of the other Peace Treaties of 1919–20 and of the Treaty of Berlin of August 25, 1921, between the United States and Germany are of especial significance. In these clauses, the 'use of asphyxiating, poisonous and other gases and all analogous liquids or devices' is treated as outlawed by an already existing prohibition and as the reason for the extension of this prohibition to the importation of such material into, and manufacture in, Germany. None the less, in Hyde's *International Law,* Vol. III (1945), p. 1818 *et seq.,* any conclusion on the declaratory or law-amending character of the Geneva Gas Protocol of 1925 is carefully avoided. In the U.S. Manual on *The Law of Land Warfare* (*cf.* Para. 29 of the 1940 ed. and Para. 38 of the 1956 ed.), the latter view has prevailed.

How important it is to try to discover the true *ratio legis* of the prohibition of the use of poison and poisoned weapons, becomes apparent from the use to which the limitation of the *ratio* to perfidy has been put (contrary to the fact that, irrespective of open or secretive use, the use of poisoned weapons is illegal). Thus, it has been suggested that because the open use of gas is not perfidious, it is supposed to be legal. See, for instance, J. L. Kunz, *Kriegsrecht und Neutralitätsrecht* (1935), pp. 81, note 85, and 85–6.

(1) *Self-Defence.* Under the international quasi-order of the Kellogg Pact and the Charter of the United Nations, resort to war in individual self-defence and for purposes of collective defence remains lawful.[59] It is arguable—as was already done by naturalist writers—that, in self-defence, the use of any means is justifiable. In particular, once an international order or quasi-order is flouted, strong reasons can be advanced, at least in a weak legal system, why no lawbreaker should benefit from the legal system he has violated. At the same time, this very situation produces its own counter-arguments against any such proposition. Within so weak an international quasi-order as that of the United Nations, the question of action in self-defence is likely to remain one of auto-interpretation, at least until the struggle is decided. Even then, whatever the objective facts may be, the victor, if any, in a cosmic war between the two halves of a divided world would be unlikely to be marked with the stigma of aggression. Actually, to permit the use of prohibited weapons to a victim of aggression would serve merely to encourage their use by all. While not to use such weapons might be interpreted as a tacit admission of not being entitled to use them, their use would mean asserting before all the world that the belligerent State concerned had acted in legitimate self-defence or for purposes of collective defence. Thus, so far, State practice has firmly, and wisely, refused to countenance any discrimination regarding *jus in bello* between belligerents claiming or lacking *jus ad bellum*.[60]

(2) *Reprisals.* Unless limited or excluded by way of treaty, reprisals are a lawful form of retaliation by means of an otherwise illegal act against a prior illegal act on the part of another subject of international law. International law does not limit reprisals to identical acts. The better opinion, which, to some extent, can rely also on international judicial authority,[61] is probably that

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[59] See further 87 Hague *Recueil* (1955), p. 327 *et seq.*, and *loc. cit* note 4, above, Vol. II, Part Six.

[60] For qualifications of this statement in fields which do not relate to the rules of warfare *stricto sensu, cf. loc. cit.* note 4, above, Vol. II, Part Six.

[61] See *ibid.*, Chap. 38.

reprisals must be proportionate to the offence against which they are directed. Once, however, the legitimacy of non-identical reprisals is admitted, it becomes somewhat difficult to assess their proportionate character.[62] Thus, even if nuclear weapons as such were held illegal, the legality of reprisals and experiences gained with reprisals and counter-reprisals in wars of the past counsel against overestimating the value of the prohibition in principle of the use of nuclear weapons by international law.[63]

(3) *Necessity.* In certain highly exceptional circumstances, the defence of necessity is admissible as an excuse for the breach of international law in relation to an innocent party.[64] If prohibited weapons may be used not even in self-defence, *a fortiori*, they may not be used on the ground of necessity. As the topic will be treated more fully elsewhere,[65] it suffices to add here a caveat against confusing with this defence arguments drawn from military necessity or, better, the necessities of war. These are not a defence against the breach of a binding rule of international law, but a synonym for wartime sovereignty. To any extent to which effective prohibitions limit this discretion, the necessities of war must be ignored.

(4) *Self-Preservation.* It would be merely repetitive to explain again in this paper why the so-called principle of self-preservation may claim to be a psychological, but not a legal principle.[66] This is not, however, to deny that this pseudo-legal notion is excellently suited for the ideological purpose of contracting out of otherwise undeniable international duties with, on the surface, impressive elegance and ease.

(5) *The Prevention of World Domination.* This justification

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[62] It is interesting to note that while, in Oppenheim's *International Law* (ed. H. Lauterpacht), Vol. II (1952), the indiscriminate use of poison gas by way of reprisals is considered criminal unless resorted to as a measure of retaliation in kind (p. 344), the use of the atomic weapon is not so narrowly limited (p. 351).

[63] The debates in the Security Council of the United Nations between June 17 and 26, 1952 (577th to 583rd meetings) show perhaps unjustified optimism on the relevance, in relation to nuclear weapons, of the non-use of poison gas during the Second World War. See further Stone, *loc. cit.* note 1, above, pp. 353 *et seq.*, and 556, and the writer's *Power Politics* (1951), pp. 209, 256, 529, 536 and 553.

[64] See further *loc. cit.* note 4, above, Vol. I, p. 641 *et seq.*

[65] *ibid.*, Vol. II, Part Six.

[66] See further *loc. cit.* note 59, above (1955) p. 343 *et seq.*

of the use of nuclear weapons is so remote from the generally recognised rules of international law as hardly requiring refutation. Had it not been put forward for consideration in a leading textbook,[67] it would not even be necessary to mention this proposition. As, in a divided world, each side is bound to accuse the other of this ultimate design, the function of this asserted right or duty ('the nations thus threatened might consider themselves bound to . . .') is to provide in advance, and indiscriminately, both sides with semi-legal justifications for the use of the 'ultimate deterrent.'[68]

(c) Additional Grounds of Illegality. On the assumption of the illegality of the use of all nuclear weapons on the ground that their radiation and fall-out effects bring them under the rules prohibiting the use of poison and poisoned weapons, additional reasons for the illegality of the use of nuclear weapons would by their cumulative character merely strengthen a conclusion already reached. Even so, such rules would be of practical importance, for breaches of these rules might aggravate what, otherwise, might be considered nominal offences on the part of, for instance, subordinate personnel. On the other hand, if the use of nuclear weapons were, in principle, considered lawful, this would greatly enhance the significance of any specialised rule by which the use of particular nuclear weapons or of any of these weapons in particular circumstances was prohibited. The rules which, under this head, call for discussion are Article 23 (e) of the Hague Regulations on Land Warfare of 1907, crimes against humanity, the Genocide Convention of 1948 and Geneva Convention IV of 1949.

(1) *The Prohibition of the Infliction of Unnecessary Suffering.* By Article 23 (e) of the Hague Regulations on Land Warfare of 1907, the use of arms, projectiles or material calculated to cause unnecessary suffering is prohibited.[69] This Clause is an application of a wider rule. In circumstances in which the application of force, or particular kinds of force, does not serve

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[67] *loc. cit.* note 62, above, p. 351, note 2.

[68] See further Vol. 8 (1955) of this Annual, p. 231 *et seq.*

[69] *loc. cit.* note 8, above, p. 116.

any purposes of warfare, the use of force is prohibited.[70] The operative clause of the St. Petersburg Declaration of 1868 is an early illustration of the codification of one facet of this rule.[71] Conversely, the legality of hand grenades, flame-throwers, napalm and incendiary bombs in contemporary warfare is a vivid reminder that suffering caused by weapons with sufficiently large destructive potentialities is not 'unnecessary' in the meaning of this rule.[72]

(2) *Crimes against Humanity.* The extension of jurisdiction over war crimes in the strict sense of the term to crimes against humanity is unknown to international customary law. If, therefore, such jurisdiction exists at all, it must be founded on other grounds. These may be consent, as in the case of the assumption in 1946 of Allied jurisdiction over Japanese individuals in this category, or *debellatio* as in that of their German counterparts.[73] It is also a plausible suggestion that, by estoppel, the members of the United Nations are prevented from denying the existence of the rules underlying this concept. Although but a recommendation, the affirmation of the Nuremberg Principles in a unanimously adopted Resolution of the General Assembly (1946) could have this effect. It might even extend to States which were only subsequently admitted to membership of the United Nations. They might be considered to have been admitted on the understanding of their acceptance of the *lex societatis.*[74]

As defined in the Charters of the Nuremberg and Tokyo International Military Tribunals, crimes against humanity cover inhumane acts against any civilian population in times of war. In view of the process of shrinkage to which, by tacit consent of the Powers, the sector of the civilian population appears to be subject,[75] the prohibition implied in this rule, establishing an additional type of extraordinary criminal jurisdiction under municipal law,[76] would be relevant at most in exceptional cases. For instance, it would apply if nuclear weapons of a size which precluded the protection of the civilian population in the most limited sense of the term,[77] were employed or nuclear weapons were intentionally used against the civilian population for purposes of terrorisation.

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[70] See further *loc. cit.* note 4, above, Vol. II, Part Six.

[71] See above, pp. 263–4.

[72] In the matter-of-fact language of the United States Army Field Manual of 1956, 'what weapons cause "unnecessary injury" can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have this effect' (Para. 34 (b)).

[73] See further *loc. cit.* note 4, above, Vol. I, pp. 297–8, and Vol. II, Part Six.

[74] See further Vol. 3 (1950) of this Annual, p. 291.

[75] See above, p. 264 *et seq.*

(3) *The Genocide Convention of 1948.* This Convention serves the purpose of providing internationally prescribed municipal criminal law against acts committed with the intention of destroying, in whole or in part, national, ethnical, racial or religious groups. The Convention is binding on fifty-two States, subject, however, to decisive reservations on the part of the Soviet Union and other East European States. Neither the United States of America nor the United Kingdom is a party to the Convention. Moreover, since the Advisory Opinion of the International Court of Justice on *Reservations to the Genocide Convention* (1951), it is somewhat uncertain which of the parties purporting to be such are actually, and in relation to whom, parties to the Convention.[78] Yet if, as it is believed, it is the law that, irrespective of the Convention, the obligations imposed by the Convention are in any case incumbent on civilised States,[79] uncertainty on the identity of the parties to the Convention matters less than it would otherwise.

Thus, if a belligerent State employed nuclear weapons with the intention not to further its strategic or tactical objectives but to eliminate groups or portions of groups protected by the Convention, this would amount to genocide. Yet, in the absence of the international penal tribunal envisaged in the Convention, only municipal courts of the State which had committed the outrage would be entitled to assume criminal jurisdiction over the individuals concerned. In addition, between States which had not made reservations on this point, the International Court of Justice would also be competent to decide on any case of alleged non-compliance with the Convention.

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[76] See further *loc. cit.* note 4, above, Vol. I, pp. 190–1 and 256.

[77] See above, p. 268.

[78] See further *loc. cit.* note 4, above, pp. 271–2 and 442 *et seq.*

[79] See *ibid.*, p. 272.

(4) *Geneva Convention IV of 1949.* On the surface, it looks as if the Geneva Convention on the Protection of Civilian Persons in Time of War of August 12, 1949, excluded altogether, at least by implication, the use of the more powerful nuclear weapons and imposed serious restraints on the use of any of these devices. The Articles on the prohibition of coercion, intimidation and terrorism appear to bear out this reading.[80] It is strengthened by the fact that these Articles belong to a Section which contains provisions common to the territories of the parties to conflicts and to occupied territories. Yet, all but one of the four Parts of the Convention are governed by a definition of protected persons which is so narrow as to make the title of the Convention somewhat misleading. Protected persons are only those civilians who, in case of a conflict or occupation, find themselves in the hands of a party to the conflict or occupying Power of which they are *not* nationals.[81]

Summary

It may be advisable to sum up the necessarily tentative conclusions reached on the legality of the use of nuclear weapons:

(1) Considerations of humanity, requirements of civilisation or other formative factors are no substitute for prohibitive rules of international law and, by themselves, do not constitute evidence of rules prohibiting the use of nuclear weapons.

(2) The principle of the exemption of the civilian population from being an intentional object of warfare as an abstraction from relevant rules of international law has been so whittled down during the Second World War and in post-1945 treaties of a humanitarian character as to cease to offer any reliable guidance. At the most, it still excludes the use of the most powerful nuclear weapons against the civilian population, provided that this sector of the population complies with two requirements—

(a) the civilians concerned must not be connected with the war effort, *and*
(b) be remote from important target areas.

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[80] Articles 31 and 33.

[81] Article 4 in conjunction with Article 13.

(3) It is possible to argue that the radiation and, in the case of 'unclean' nuclear weapons, their fall-out effects

(a) make applicable to nuclear weapons the rules of international customary law by which the use of poison and poisoned weapons is prohibited, as well as Article 23 (a) of the Hague Regulation of 1899 and 1907 on Land Warfare, and

(b) the Geneva Protocol on Poisonous Gases and Analogous Materials of 1925, the provisions of which were treated in the post-1919 period as declaratory of existing international law.

(4) On the assumption of the illegality in principle of the use of all nuclear weapons, the legality of their use by way of reprisals must be accepted within the limits within which reprisals are admitted in international law, but cannot be justified or excused on any other ground.

(5) If nuclear weapons of a calibre which does not allow for exemption from warfare of the civilian population as defined under (2) (a) and (b) above are used, or this sector of the enemy population is made the intentional object of nuclear attack, it is a tenable proposition that such acts amount also to crimes against humanity, that is to say, their commission authorises the enemy Power to assume jurisdiction over the individuals concerned as in the case of war crimes *stricto sensu.*

(6) If nuclear weapons are employed for purposes prohibited by the Genocide Convention of 1948, which, to this extent, may be considered to be merely declaratory of international customary law,

(a) the commission of such acts amounts to an international tort;

(b) the courts of any State are probably *entitled* to assume jurisdiction under their own criminal law over individuals alleged to have committed such crimes, and

(c) if the State in the territory of which such crimes have been committed is a party to the Genocide Convention, alleged offenders *must* be tried by a competent Court of this State.

THE MANUFACTURE AND POSSESSION OF NUCLEAR WEAPONS

In principle every sovereign State is free to manufacture or possess nuclear weapons. If any specific authority for this statement of the law were required, it would be furnished by the general practice of States regarding the manufacture and storage of poison gas. Even States which are parties to the Geneva Poison Gas Protocol of 1925 have continued to manufacture poison gases, keep considerable stores of these prohibited weapons and have even prepared for the eventuality of bacteriological warfare. In each case, the ultimate justification is that, even if it were accepted that non-parties are also bound to observe these prohibitions on the basis of international customary law, it might be necessary to use these weapons by way of retaliation in kind.[82]

The Peace Treaties of 1947 with Italy, Bulgaria, Finland, Hungary and Roumania offer illustrations of undertakings on the part of these countries not to 'possess, construct or experiment with any atomic weapon.'[83] Similarly, in the Final Act of the London Conference of 1954, the Chancellor of the Federal Republic of Germany undertook towards the Brussels Treaty Powers that the Federal Republic would not manufacture, *inter alia,* any atomic weapons nor allow such weapons to be manufactured in its territory.[84] The Agreement contains a significant definition of an atomic weapon as 'any weapon which contains, or is designed to contain or utilise, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass poisoning.'[85]

[82] See above, pp. 279–80, and below, p. 290.

[83] Italy: Article 51 (Cmd. 7481–1948); Bulgaria: Article 13 (Cmd. 7483–1948); Finland: Article 17 (Cmd. 7484–1948); Hungary: Article 15 (Cmd. 7485–1948), and Roumania: Article 14 (Cmd. 7486–1948).

[84] Cmd. 9289 (1954), II (15). See further H. W. Briggs, 49 A.J.I.L. (1955), pp. 156–7.

For limitation of the uses of nuclear material supplied by the United Kingdom to contracting parties, *cf., e.g.,* the Anglo-Belgian Agreement of November 18, 1955 (Cmd. 9632), the Anglo-German Agreement of July 31, 1956 (Cmd. 9842), the Anglo-Norwegian Exchange of Notes of July 12, 1957 (Cmnd. 277) and the Anglo-Swedish Agreement of September 20, 1957 (Cmnd. 290) and, for a reciprocal arrangement to the same effect, *cf.* the Anglo-American Agreement of June 15, 1955 (Cmd. 9560).

[85] Cmd. 9289 (1954), p. 6. See also notes 24 and 49 above.

In each case, it is a matter of the intention of the parties whether the Powers which are the beneficiaries of these rights are entitled individually, *vis-à-vis* themselves, to release the obligated State, or may do so only by their joint action. In any case, non-parties are not entitled to rely on these limitations of the exercise of State sovereignty.

THE TESTING OF NUCLEAR WEAPONS

In the absence of treaty obligations which impose international obligations on States regarding any particular territory,[86] any State is free to use its own territory for any purpose it likes, including the testing of nuclear weapons.

If such tests cause injury to life, health or property of subjects of other sovereign States, the general rules of international law apply. If the damage is suffered in the territory of another sovereign State, the act which has caused such injury constitutes an illegal interference with the sphere of exclusive jurisdiction of the other State concerned. The tortfeasor State has broken its obligation under international customary law 'not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[87] The action amounts to an international tort with all the legal consequences which flow from such an illegal act.[88]

If tests are carried out in such a way that, at least temporarily, parts of the high seas are not available for other users, it is necessary to view this matter with a sense of perspective. The evolution of the law of the sea shows that at no stage has the list of lawful users of the high seas ever been closed. As new needs emerged, new users were added to those already established. Naval exercises which have always been treated as a lawful form of the peacetime exercise of the freedom of the seas also involve frequently the temporary closure of certain portions of the high seas. The question is how to adjust to each other conflicting users, all of which, *prima facie*, may claim to be lawful. It is still a moot question whether these rights stand side by side as absolute rights or must be reduced to relative rights, which must be exercised in a spirit of reasonableness and moderation. The Judgment of the World Court in the *Anglo-Norwegian Fisheries Dispute* (1951) offers some authority for preference being given to the latter view.[89] In the relations between members of the United Nations, the principle of good neighbourliness, incorporated into the Charter as a legal principle,[90] points even more strongly in the same direction. Yet, at which point reasonableness becomes unreasonableness, and moderation changes into its opposite, is hardly a subject on which it is advisable to be dogmatic. Plausible cases, determined ultimately by meta-legal hierarchies of values,[91] can be made either way regarding the reasonableness and moderation with which the United States of America and the United Kingdom have declared considerable areas in the Pacific Ocean as temporary danger zones. While it is impossible on a topic of this kind ever to attain more than controversial interpretations of what constitutes compliance with international law, it would at least be feasible to obtain an authoritative view of the subject if the Powers consented to clarify the issue by means of an advisory opinion of the World Court.

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[86] Whether nuclear tests carried out in a trust territory, even one which is a strategic area, comply with the letter or spirit of the relevant Articles of the United Nations Charter or a trusteeship agreement such as that concluded between the United Nations and the United States of America regarding the former Japanese Mandated Islands (approved by the Security Council on April 2, 1947) may be doubted. In any case, the matter is sufficiently controversial to lend support to the suggestion made by the Indian Government in the Trusteeship Council that this would be a proper subject for an advisory opinion by the World Court.

On the factual aspects of the evacuation in 1947 of the inhabitants of the Bikini and Eniweitok Atolls and the fall of radiated ash on two other inhabited Marshall atolls, *cf.* International Review Service, *Radiation Hazards* (1956), p. 6 *et seq.* *Cf.* also G. Fischer, *L'énergie atomique et les Etats-Unis* (1957), p. 372 *et seq.*

[87] *Corfu Channel* (*Merits*) case, *I.C.J. Reports* 1949, p. 22. See further *loc. cit.* note 4, above, pp. 114 *et seq.*, and 632 *et seq.*

On the *Trail Smelter* case (1938–41) between Canada and the United States of America, *cf. ibid.*, p. 631.

[88] See further *ibid.*, p. 653 *et seq.*

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[89] *I.C.J. Reports 1951*, p. 129. See further *loc. cit.* note 4, above, pp. 321 and 348–9.

[90] Preamble and Article 74. See further *loc. cit.* note 4, above, pp. 50–1 and 218, and the writer's letter to the Editor of *The Manchester Guardian* on *Mass Expulsion of Foreigners*, December 14, 1957.

[91] See, for instance, the carefully reasoned case made by M. S. McDougal and N. A. Schlei, 64 Yale L.J. (1955), p. 648 *et seq.*, in favour of the legality of these tests and references to other views on this topic, *ibid.*, note 9, and further Z. Ôhira, 5 *Annals of the Hitotsubashi Academy* (1954), p. 92 *et seq.*, S. Oda, 53 *Friedens-Warte* (1956), p. 126 *et seq.*, and last, but certainly not least, the magisterial exposition of the subject by Professor G. Gidel in Spiropoulos *Festschrift* (1957), p. 173 *et seq.*

Until this happens, it must remain uncertain whether the temporary closure of parts of the high seas for purposes of nuclear tests can claim to be legal. It is more easily arguable that any actual harm inflicted as the result of such tests to the life, health or property of others outside these danger zones amounts to the commission of an international tort.[92]

So long as nuclear weapons remain as 'unclean' as they are, that is to say, their radioactive fall-out is more than negligible, indefinite continuation of nuclear tests is likely to lead to an increasingly dangerous pollution of the atmosphere and water of about the same average all over the world. Once this competition in cosmic irresponsibility has reached a point when it threatens to affect seriously the life and health of the populations of the rest of the world, States which do not indulge in these tests will have to consider a problem that, at this stage, it will suffice to pose: the issue of joint tortfeasors in international law.

CONCLUSIONS

In spite of the danger of political exploitation of any view expressed on a topic such as the legality of nuclear weapons, it remains true that every single question discussed in this paper is a strictly legal problem and, at least tentatively, answerable by reference to international law. If the Powers were prepared to verify their own positions on any of these issues it would not even be necessary for them to accept for this purpose the contentious jurisdiction of the World Court. The General Assembly or the Security Council of the United Nations—and, on the narrower issue of the legality of nuclear tests in trust territories forming strategic areas, also the Trusteeship Council—are always entitled to request an advisory opinion from the World Court. It appears, however, that neither side is unduly anxious to obtain an authoritative ruling on this matter by the 'principal judicial organ of the United Nations.'[93]

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[92] In view of the fact that maritime practice has not treated the pollution of the high seas by oil as by itself a tortious abuse of the freedom of the seas, but has considered a convention on this subject necessary, it is doubtful whether any international claims arise from unremunerative catches of fish which had become radioactive before capture and the ill effects of the consumption of such fish. Cf., the International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954 (Cmd. 9197–1954).

These doubts are strengthened by the highly cautious formulation of Article 48, dealing with pollution of the high seas by oil and radioactive waste, of the draft Articles concerning the Law of the Sea, which were drawn up by the International Law Commission (51 A.J.I.L. (1957), p. 172).

Admittedly, the value of such a pronouncement should not be over-estimated. It would not put a stop to the world's most expensive and pointless armament race. Both sides would insist and, in the absence of a strong world government, with some measure of justice, that the existing equilibrium of terror was probably the only effective protection against nuclear Armageddon.

At this point, it becomes hopelessly inadequate to content oneself with even the most persuasive exposition of either the legality or illegality of nuclear weapons. The one means little more than confirming in a still further field the parting of the ways of international law and the standard of civilisation.[94] The other amounts to more or less the same thing, for, even on this assumption, the use of nuclear weapons by way of reprisals remains legal. Moreover, if it should ever come to an all-out contest by force between the super-Powers of our age, it would be sheer day-dreaming to expect that in their fight for survival, and so necessarily world hegemony, they would refrain from the use of any weapon in their arsenal.

Once things have come to such a pass, the overriding issue is whether the relentless process of the concentration of power in fewer and fewer hands will be completed—if completed it will be—by agreement or, as hitherto, by force. At this point, the first, and most self-denying, duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanised barbarism.

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[93] Article 92 of the United Nations Charter.

[94] See further Vol. 8 (1955) of this Annual, p. 212 *et seq.*

This is not to imply that the international lawyer should wash his hands of all responsibility in the matter. In order to make his own specific contribution to the tasks ahead, he must, however, remove his own thought barriers—to employ Stephen King-Hall's apt terminology. He must be prepared to defy outmoded conventions of a more secure age and be prepared to consider legal planning as one of the essential social functions he has to fulfil. He must be willing to consider without fear or favour any changes in the structure of existing world society, however radical, which may be required to break the vicious circle of our system of world power politics in disguise.

In this perspective, a treaty outlawing the use of even the whole 'family' of nuclear weapons would be grotesquely incongruous to the challenge confronting us. As hitherto, the world powers would continue to prepare themselves for the contingency that the other side would break its solemnly pledged word, and everything would remain exactly where it was before.

A treaty providing for a monopoly of nuclear energy in the hands of a world atomic energy authority would be nearer the mark. Yet, to be effective, a supra-national agency of this kind would amount to a world State for the particular purpose of depriving the members of the nuclear club of their most dangerous and barbarous toys.[95] This is not an argument against this pattern. In fact, however 'utopian' *within* the existing framework of world politics, the federal pattern appears to provide the only commensurate constructive answer to the impotence of the parochial State, mistermed 'world power,' to protect its citizens against the worst but by no means unlikely, risks of a divided world.[96] If the only other choice which is offered to our generation is indefinite co-existence under fear of co-extermination, a nuclear armament race of gigantic proportions and gradual pollution of the air, water and soil, nothing can be more vital than to think of constructive alternatives, however great sacrifices their attainment may demand.

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[95] See further the writer's *Power Politics* (1951), pp. 551 *et seq.*, and 725 *et seq.*

[96] *Defence. Outline of Future Policy*: 'It must be frankly recognised that there is at present no means of providing adequate protection for the people of this country against the consequences of an attack with nuclear weapons' (Cmnd. 124–1957, p. 2) or the statement made by Mr. Sandys, United Kingdom Minister of Defence, at Canberra, August 20, 1957: 'That is why we have taken a very bold step in deciding not to do the impossible. We decided not to defend the whole country, but to defend only our bomber bases' (*The Times*, August 21, 1957). At Wellington Mr. Sandys expressed himself in similar terms (*ibid.*, September 5, 1957).

Adherents of the revision of the laws of war school have countered this argument with a pertinent question: Is it any easier to abolish war than to aim at a revision of the rules of warfare which would arrest the trend towards total war?[97] The obvious answer is another question: Would it arrest this trend? Three considerations make it unlikely that, in this way, total war on a global scale could be avoided. Warfare in the nuclear age appears to put a premium, however illusory, on the strategy of the first crippling blow. In a world society which has reached the penultimate state in the process of the concentration of power and, in which, therefore, any major war must become a struggle for world domination, each side is likely to put survival and mastery over the rest of the world before any other consideration. Finally, in all probability, this type of war would be fought with all the fervour, and the concomitant cruelty, of a semi-religious war. In this contingency, legal restraints which, on the ground of reprisals, may always be thrown at will to the winds, are hardly of a calibre commensurate to our problem.

This brings us to the answer to the first question posed. It is *not* easier to aim so high. It is probably much more difficult, but it appears very much more worthwhile. What is needed is a world public order which any of the parochial States can flout only at its own risk. Anything less may be all that is attainable, but falls sadly below the world safety minimum.

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[97] See, for instance, J. L. Kunz, 45 A.J.I.L. (1951), p. 61, in a stimulating paper which has contributed much to revive interest in the study of the laws of war.

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